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96th Congress } SENATE { Rept. 96-1018
2d Session } { Part 2

REFORM OF FEDERAL REGULATION

COMPLETED

JOINT REPORT

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS

AND THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

TO ACCOMPANY

S. 262

TO PROVIDE FOR THE REGULATORY ANALYSIS OF PROPOSED RULES AND THE REVIEW OF EXISTING RULES BY THE AGENCIES, TO MAKE OTHER IMPROVEMENTS IN REGULATORY PROCEDURES, TO ESTABLISH THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AND FOR OTHER PURPOSES

together with

ADDITIONAL VIEWS

October 30, 1980.—Ordered to be printed
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96TH CONGRESS } SENATE { REPT. 96-1018
2d Session } { Part 2

REFORM OF FEDERAL REGULATION

OCTOBER 30, 1980.—Ordered to be printed

Filed under authority of the order of the Senate of OCTOBER 2 (legislative day, JUNE 12), 1980

Mr. RIBICOFF, from the Committee on Governmental Affairs, and on behalf of Messrs. KENNEDY and CULVER, from the Committee on the Judiciary, submitted the following

JOINT REPORT*

together with

ADDITIONAL VIEWS

[To accompany S. 262]

I. PURPOSE AND SUMMARY OF THE ACT

The Regulatory Flexibility and Administrative Reform Act of 1980 is a comprehensive regulatory reform bill which improves the regulatory process in four main ways. First, the bill increases the fairness and effectiveness of the regulatory process by requiring agencies to examine carefully the likely economic and non-economic effects of all proposed major rules. Second, the bill amends the current Administrative Procedure Act to encourage effective public participation in administrative proceedings and to expedite agency adjudications. Third, the bill improves the substance of government regulation by encouraging the President and Congress to review the regulatory process, agency-by-agency program-by-program, to eliminate needless burdens and to achieve important public goals more effectively. Finally, it provides important new management tools to enhance the ability of the Executive Branch to coordinate regulatory policies and activities.

This legislation, supported by a broad bi-partisan coalition on the Committee, is an effort to achieve meaningful regulatory reform without destroying the regulatory agencies' ability to serve the public interest. It comes in response to a growing national concern about the impact of government regulation on the economy and about the ability of agencies to respond effectively and sensibly to pressing national problems.

A brief summary of the major provisions of the bill follows.

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*This part of the report is on S. 262 as approved by the Committee on the Judiciary. A separate volume, part 1 of the report, contains the report on the bill as approved by the Committee on Governmental Affairs.

1. REGULATORY ANALYSIS

S. 262 requires agencies to prepare a regulatory analysis when promulgating certain proposed "major" rules. This analysis will ensure that the agencies carefully examine—and the public have an opportunity to comment on—the economic and noneconomic impact of those rules which will have at least a $100 million impact on the economy. Regulatory analysis is an important management tool, derived from Executive Order No. 12,044 issued by President Carter in 1978. It is designed to encourage agencies to seek less burdensome ways of achieving their statutory goals, while keeping intact the underlying statutory requirements which govern an agency's actions.

2. REGULATORY FLEXIBILITY ANALYSIS

S. 262 requires an agency to prepare a "regulatory flexibility analysis" when it determines that a proposed rule will have a significant economic impact on individuals, small businesses, small organizations or small governmental jurisdictions. The agency must solicit and consider alternatives to a proposed rule which would minimize the burdensome effects of the regulation on these small entities. The purpose of this provision is to encourage agencies to tailor their regulations to the size and resources of regulated entities. This provision is derived from S. 299, signed into law on September 19, 1980.

3. REGULATORY POLICY BOARD

A major goal of S. 262 is to improve the ability of the federal government to coordinate and manage diverse and sometimes conflicting regulatory policies of different agencies. This legislation creates a statutory Regulatory Policy Board—composed of three regulators, three non-regulators, and the Chairman of the Administrative Conference—to accomplish this goal. The Regulatory Policy Board is given the oversight responsibilities now performed mainly by the Regulatory Council and the Regulatory Analysis Review Group, plus several additional responsibilities. (The Board is given the authority to override the determination of a regulatory agency that a rule is, or is not, a major rule.) Under the terms of the legislation, the major rule determination is a critical decision that triggers the requirement to perform a regulatory analysis and to fulfill other management responsibilities.

4. HYBRID RULEMAKING

S. 262 expands the opportunities for public participation in the agency rulemaking process when the agency is considering a "major rule." Under the existing Administrative Procedure Act, an agency is required only to publish a notice of proposed rule making in the Federal Register and to receive comments on the proposal. These minimal procedures were adopted over thirty years ago, at a time when federal regulation played a small role in the national economy. Today, as federal regulatory activity has an increasing impact on the daily lives of most Americans, there is a growing public frustration with the seeming inability of interested persons and groups to have meaningful involvement in the regulatory process. S. 262 is designed to update the Administrative Procedure Act to the realities of modern regulatory decisionmaking by requiring an agency to use additional oral and written procedures in major rulemakings, and to permit the public to have a meaningful opportunity to comment on any information or materials which the agency will substantially rely upon in formulating the final rule.

5. AGENCY-BY-AGENCY REVIEW OF THE REGULATORY PROCESS

Title III of S. 262, known as the High Noon provision, requires an agency-by-agency evaluation of the federal regulatory process. This title supplements, but is not intended to replace, the normal congressional oversight process by requiring the President and the Congress to review key regulatory agencies according to a fixed twelve-year schedule. It also mandates consideration of new legislation, where appropriate, to eliminate burdensome and costly regulation; to achieve more effectively important public goals like the protection of health and safety; and to rely upon less restrictive approaches to obtain statutory objectives. The proposal creates action-forcing procedural mechanisms to expedite congressional action on this regulatory reform legislation. These mechanisms are similar to those found in the Congressional Budget and Impoundment Control Act of 1974.

6. EXPEDITED ADJUDICATORY PROCEDURES

One of the most pervasive criticisms of the regulatory process is that it is too slow. This legislation will permit an agency to use a less formal, less cumbersome hearing procedure in certain instances where a trial-type hearing is not necessary. This procedure will narrow contested issues early in the process and permit cross-examination of witnesses only on those few issues where it would be essential to fair and accurate decisionmaking.

7. VENUE

S. 262 is designed to improve the venue laws by encouraging courts to consider local impact when they determine whether to transfer a case to another jurisdiction. It accomplishes this goal in three ways. First, it provides that whenever an action arguably of a local environmental nature is brought in the United States District Court for the District of Columbia, the plaintiff must forward a copy of his complaint to the attorneys general of up to five states affected by the suit. Second, the section encourages federal district and appellate courts to consider local impact when deciding motions to transfer. Third, it creates a presumption that courts must transfer a local environmental case to another judicial district when the action primarily affects local or regional interests in that district, unless there is a substantial hardship or injustice, or the impact of the action is substantially national rather than local in effect or scope.

8. JUDICIAL REVIEW OF AGENCY REGULATIONS

S. 262 provides for stricter judicial review of agency rules. Section 216, first proposed by Senator Dale Bumpers (D-Arkansas) and now known as the "Bumpers" amendment, modifies the existing scope of judicial review of federal regulations in three ways. The section instructs courts to review agency rules without according them a "presumption of validity." Second, courts must set aside regulations, where the agency's factual determinations are unsupported by "substantial evidence". Finally, reviewing courts must determine that an agency's statutory jurisdiction has been granted "expressly" or by "clear implication."

9. ADMINISTRATIVE LAW JUDGES

S. 262 improves the system for recruiting and examining Administrative Law Judges (ALJ's). First, it moves the responsibility for management of the ALJ program to the Office of the Chairman of the Administrative Conference from the Office of Personnel Management. Second, it expands the number of qualified ALJ's available to the agency. Third, it establishes a task force to study the independence of ALJ's and to examine the feasibility of establishing an independent corps of ALJ's.

10. ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

S. 262 gives the Administrative Conference additional authority to improve the quality of administrative proceedings. In particular, it gives the Conference the responsibility for selecting and reassigning ALJ's and for establishing procedural rules for agency proceedings.

11. CHANGES IN THE ADMINISTRATIVE PROCEDURE ACT

S. 262 makes several changes in the Administrative Procedure Act, which was adopted in 1946 and has remained essentially unaltered over the last thirty years. These revisions are designed to accomplish certain relatively technical reforms and to make the structure of the Act more coherent.

II. BACKGROUND AND LEGISLATIVE HISTORY

"(T)he true test of a good government is its aptitude and tendency to produce a good administration." Alexander Hamilton, *The Federalist Papers*, No. 68.

A. BACKGROUND

Since 1887 when Congress established the Interstate Commerce Commission to regulate the American railroads, the federal government has taken an increasingly active role in regulating the American economy. Most of this growth in federal regulatory activity has occurred since the mid-1960's. Until then, regulation consisted largely of efforts by both federal and state governments to control prices of, and limit entry into, the utilities, communications and transportation markets. The federal government played a limited role in the economy and rarely became involved in promoting social goals except in certain narrow areas like ensuring the safety of food and drugs. The protection of public health and safety remained primarily the responsibility of state and local governments.

Beginning in the mid-1960's, the scope of federal regulation greatly expanded as the public began to demand more active government involvement in solving the serious economic and social problems of the nation. In his 1963 State of the Union address, President Kennedy exhorted the Congress to adopt measures "to provide opportunities" for the millions of Americans "who live on the outskirts of poverty" and to ensure that the "quality of American life keeps pace with the quantity of American goods". Subsequent Democratic and Republican Administrations supported enactment of legislation to achieve these goals.

Prompted by active Administration support and a widespread public belief in the need for active federal intervention to solve the nation's complex economic and social problems, Congress initiated many new regulatory programs. Just in the last decade, it created seven new regulatory agencies and enacted 29 major regulatory statutes. Much of this new regulatory legislation was designed to protect more effectively consumer interests and the public health and safety. Congress adopted long overdue legislation to protect the environment; to ensure the health and safety of American workers; to protect consumers from unfair trade practices; to improve public education and mass transportation; and to protect the civil rights of minorities and women. More than at any other time since the New Deal, the American people looked to the federal government to improve the quality of life.

Economic regulation, of the traditional kind, also expanded during the last fifteen years. As spiralling OPEC oil prices stimulated national concern about America's energy future, the federal government began to regulate oil prices and other aspects of energy production. A Department of Energy was established in 1977. The federal government also increased regulatory protection of those involved in economic transactions like investors, pension holders, and commodities traders.

By any measure, federal regulation expanded quickly and significantly. Permanent full time positions in regulatory agencies grew from 28,000 in 1970 to 81,000 in 1979. Some economists estimate that the budgeted expenditures of the 56 agencies having major regulatory functions increased from 1.2 billion dollars in 1971 to an estimated 6 billion dollars in 1980—a 400-percent increase over the decade. (*See* K. Chilton, "A Decade of Rapid Growth in Federal Regulation", St. Louis, Center for the Study of American Business, 1979.) Professor Paul MacAvoy estimated that in 1965, 8.5 percent of the Gross National Product was produced in regulated industries. By 1975, that percentage increased to 23.7 percent. (P. MacAvoy, *The Present Condition of the Regulated Industries,* Yale School of Organization and Management 1979, Working Paper No. 6 at p. 17.)

The cost of regulation to the private sector has also grown substantially in the last two decades. A study of the impact of six federal regulatory agencies on 48 major U.S. corporations in 1977, concluded that the annual cost of compliance with their regulations was $2.6 billion. Arthur Anderson & Co., "Cost of Government Regulation Study for the Business Roundtable" (March, 1979).

By the mid-1970's, the pendulum began to swing away from the regulatory growth. The public began to question the increasing intrusion of the federal government into the marketplace and to recognize that government can cause as many problems as it solves. As a result of growing inflation and declining productivity, the nation started to focus on the costs and anticompetitive effects of government regulation.

Commentators on changing trends in American ideology analysed the impact of the growing bureaucratic structure on American theories of democracy. As early as 1969, a political scientist from the University of Chicago, Theodore Lowi, discussed the "end of liberalism" arising from the serious public doubt about "efficacy and justice in the agencies of government." (See Theodore. J. Lowi, *The End of Liberal Ideology, Policy and the Crisis of Public Authority* (1969).) American historian, Henry Steel Commager, commenting in a television interview last spring on the "dangers of a legislative bureaucracy", concluded that the challenge to a modern democracy is to control bureaucratic intervention in the day-to-day working of American life. (*Bill Moyers's Journal*, "Democracy in America"—A Conversation with Henry Steel Commager, April 16, 1979.) And economists prepared studies examining whether the costs of government regulation are commensurate with its benefits.

This disenchantment with government regulation should not be overemphasized. According to national polls, a majority of Americans feel that it is a proper role of the federal government to protect the public health and safety. (See S. Kelman, "Regulation that Works", *The New Republic*, November 16, 1978.) Indeed, *Public Opinion* magazine (June, July 1980), issued by the American Enterprise Institute, concluded that 68 percent of the American public agrees that if companies were left to themselves, and not regulated, the consumer would suffer. Moreover, there is widespread acknowledgment of the substantial benefits arising from government regulation, particularly in the health, safety and environmental regulation. The Center for Policy Alternatives of the Massachusetts Institute of Technology prepared a study quantifying these benefits. For example, the study concluded that:

—the benefits of regulating air pollution from major sources range from $5 billion to $58 billion per year.

—OSHA limitations on worker exposure to asbestos may result in a reduction of 630 to 2,500 deaths per year from lung cancer and asbestosis.

—motor vehicle occupant protection standards between 1966 and 1970 saved over 28,000 lives between 1966 and 1974.

Perhaps even more importantly, the study pointed out the dangers implicit in trying to put dollar figures on benefits of government regulation. (*See* Senate Comm. on Governmental Affairs, "Benefits of Environmental, Health and Safety Regulations", 96th Cong., 2d. Sess., Comm. Print 1980.)

However, while recognizing the benefits of regulation, a growing number of Americans is also concerned about the size of the federal government and the limitations of government in creating a perfect society. Accordingly, Congress has begun to re-evaluate the role of government intervention in the marketplace and to search for innovative and less restrictive approaches to serving the public interest.

The concern about regulatory reform is not new. Since the New Deal spurt of regulatory growth, numerous commissions have been established to find solutions to regulatory problems. The perspectives have been different. In 1937, the Brownlow Committee, established by President Franklin Roosevelt, pointed to the "independent" regulatory commissions as consituting a serious and increasing impediment to improving the regulatory process. (See the President's Committee on Administrative Management, *Report of the Committee, With Studies of Administrative Management in the Federal Government* 39–41 (GPO 1937).)

Other studies emphasized that better qualified personnel was the key to improved agency performance. James Landis, former Harvard Law School Dean, pointed out in his report to President Kennedy: "The prime key to the improvement of the administrative process is the selection of qualified personnel. Good men can make poor laws workable; poor men will wreak havoc with good laws." (J. Landis, *Report on Regulatory Agencies to President-Elect*, Committee Print, Subcommittee on Administrative Practice and Procedure, Senate Committee on the Judiciary, 86th Cong., 2d Sess., 1960) The Ash Council in 1971 recommended that one important approach to improving review policies would be to give agency heads more power and authority. The President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* (GPO 1971).

Recent Congresses have adopted two very different approaches to regulatory reform. The first approach is to examine a specific agency in detail and to rewrite that agency's authorizing legislation to improve its performance. Thus, Congress deregulated the airline industry after a detailed examination of the work of the Civil Aeronautics Board; and it has recently enacted legislation that will lead to more competition in the trucking industry.

The second approach is to propose generic legislation—legislation that applies to several, or to all, agencies—that seeks to improve agency performance. Several different types of such generic legislative proposals have proved particularly popular: (1) Some bills would require agencies to write "impact statements". These statements may focus the agency's attention on, for example, the need for a clean environment, the desirability of competition, the special problems of small business, or other similar objectives. By focusing the agency's energies on these objectives, the legislation would encourage agencies to adopt better regulatory policies. (2) Other bills would improve agency performance by increasing the extent to which a broad range of interests are represented before the agency when it makes decisions. These bills would institute procedural changes which provide a fairer, more effective way for participants to present their positions. If those affected have a fair opportunity to make their case, the agency outcome will be fairer and perhaps substantively better. (3) Still other bills would seek to institutionalize the step-by-step review of individual agency programs. The overall review of an agency program might be conducted by Congress, by an Executive Branch official or entity outside the agency, or even by the agency itself. These bills would seek to ensure that reviews were done often enough, by sufficiently objective bodies, so that major reforms in the way individual agencies carry out their tasks will occur as needed.

The bill here reported—the Regulatory Flexibility and Administrative Reform Act of 1980—is an example of generic regulatory reform legislation. It contains elements of each of the three sorts of generic proposals just described above.

B. THE THREE ELEMENTS OF GENERIC REGULATORY REFORM

This section will outline the genesis of the three types of proposals which form the essential elements of the Regulatory Flexibility and Administrative Practice Act of 1980.

1. Impact-Type Statements

One inherent problem in reforming regulatory policymaking is that Congress tends to delegate authority to agencies in very broad terms. For example, the Federal Communications Commission is required to award licenses consistent with the public convenience, interest or necessity (47 U.S.C. § 307); the Occupational Safety and Health Administration has been told to promulgate standards which ensure "safe" and "healthful" employment and places of employment (29 U.S.C. § 652(8), § 655(a)); and the Federal Trade Commission is instructed to eliminate unfair and deceptive practices (15 U.S.C. § 57a).

The Committee recognizes that broadly worded delegations of power may be necessary in an increasingly complex society where Congress lacks the technical knowledge and expertise to hammer out the details of a regulatory policy. This is precisely why Congress originally created agencies—to serve as experts. Nonetheless, this practice of shifting difficult policy choices to appointed rather than elected officials has raised some concerns in the courts. (*See* Justice Rehnquist's concurring opinion in *Industrial Union Dept.* v. *American Petroleum Institute*, 100 S. Ct. 2844, 2878 (1980).)

One way in which this legislation attempts to respond to this problem of harnessing an agency's discretion is to require an agency to consider certain criteria in fulfilling its statutory mandate. In this way, Congress can clearly instruct an agency to consider particular factors in formulating its decisions. This approach was initiated, in part, by the White House. President Ford, by Executive Order No. 11,821, 39 Fed. Reg. 41501 (1974), as amended by Executive Order No. 11,949, 42 Fed. Reg. 1017 (1976), required agencies to write an economic impact statement in which the agency would determine how much its proposed action would raise costs and whether there were alternative, less costly ways of dealing with the problem. President Carter withdrew this order and in 1978 issued Executive Order No. 12,044, 43 Fed. Reg. 12661 (1978) which requires an agency, before it takes an action, to describe in writing its objectives and alternative ways of achieving them in a more cost-effective manner.

This Congress, Senator Kennedy introduced legislation (S. 382, S. 1291) which would require an agency to take the least anti-competitive means to achieve its statutory goals. Senator Culver introduced legislation (S. 299) to require agencies to consider alternatives which would minimize the impact of their regulations on small businesses, small organizations and small governmental jurisdictions. And Senator Ribicoff introduced legislation (S. 262, S. 755) which, among other things, would require an analysis of the economic and noneconomic consequences of rules having an impact in excess of $100 million.

Some people have compared these regulatory analysis requirements to the Environmental Impact Statement required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* (1976), which requires an agency to study the environmental effects of a proposed federal activity and prepare a statement, without requiring that it act in one way or another. Although some people believe that NEPA imposes unnecessary "red tape", many experts believe it has made agencies more sensitive to environmental projects. *See* R. Stewart and J. Krier, *Environmental Law and Policy* (2d ed., 1978.))

The Committee believes that the impact requirements contained in the bill are important tools for improving the quality of agency decisionmaking and for giving agencies additional instructions as to the factors which Congress considers essential for effective and balanced regulatory policymaking.

2. Procedural Fairness in Agency Decision-Making

In the past decade the courts, the agencies, and the Congress have tried to broaden the degree of public participation in agency decisionmaking. Consumer groups, public interest law firms, environmental groups, small businesses and others claiming to represent those who cannot readily organize themselves have not only been allowed to appear before agencies but their appearance has been encouraged, sometimes by government payment of their costs [1] and sometimes by expanded procedural rights. Simultaneously the courts have expanded the rights of the public to appeal agency decisions to the courts (*See, e.g., Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F. 2d. 994, 1003–4 (D.C. Cir. 1966) (Burger, J., Circuit Judge); and Congress has enacted laws allowing greater access to agency information and forced the agencies to meet and to make decisions in public. (*See*, e.g., The Freedom of Information Act, 5 U.S.C. § 552 (1976); The Government in the Sunshine Act, 5 U.S.C. § 552b *et seq.* (1976).)

The cumulative impact of these laws has been to transform the decision-making process into a more open forum in which a wide variety of interest groups are represented and agency decisions emerge from their evidence, argument and negotiation. The rise of this "interest representation" model of the administrative process is the characterizing feature of the procedural change of the last decade. (*See* R. Stewart, "The Reformation of American Administrative Law", 88 Harv. L. Rev. 1667 (1975).) This approach can work only if the procedures for agency decision-making are fair, provide an adequate opportunity for presentation of views, and yet are not unwieldy.

There has been a growing consensus for making certain changes in the Administrative Procedure Act which would increase public participation in agency rulemaking proceedings. The minimal procedural requirements which the APA imposes in informal rulemaking, have been criticized as inadequate. Current law, which requires only that an agency provide "notice and accept comments" (5 U.S.C. § 553 1976), gives considerable flexibility to agencies, but this freedom to act may appear unfair to affected persons. In response, the courts have begun to require agencies to explain their decisions in greater detail, to show how the decisions were based upon the material before them, and to allow the affected parties to examine and respond to the documentary evidence upon which the agency has substantially relied.

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[1] Some Senators, such as Senators Kennedy and Ribicoff, have supported legislation to provide funding for economically needy groups or individuals who are likely to contribute substantially in agency rulemaking proceedings. (*See, e.g.*, S. 1291.) Such intervenor funding programs were initiated in 1975 at the Federal Trade Commission. (*See* 15 U.S.C. § 57a.)

Congress has sometimes required that agencies use "hybrid" rulemaking procedures when they promulgate rules of great significance. For example, at FTC hearings, (15 U.S.C., 57a(c) (1976)), there is a limited opportunity for cross-examination; the Occupational Safety and Health Act, (29 U.S.C. § 655(b)(1)), encourages use of advisory committees; and the Clean Air Act, (42 U.S.C. § 1857 *et seq.* (1976)), requires an agency to do more than "notice and comment" alone.

This bill reflects these procedural trends and applies many of them across-the-board to all federal agencies. The bill also makes other procedural changes which increase the efficiency and the fairness of agency proceedings. For example, it establishes a procedure for expedited adjudications in proceedings predominantly involving policy issues.

3. *Reform of the Quality of Government Regulations*

Perhaps the most fundamental challenge in regulatory reform is to improve the quality of government regulation. This can be accomplished in two ways. The first is by improving the ability of the Chief Executive to manage ever-growing, seemingly innumerable regulatory fiefdoms, some of which are independent agencies and others within the Executive Branch. The second is by stimulating better congressional oversight of the regulatory process and by encouraging the President and Congress to enact legislation which relies on innovative, rather than traditional "command and control" regulatory techniques for accomplishing important social and economic goals.

a. Executive Management.—One of the most frequent criticisms of the regulatory process is that the President can no longer perform his constitutional responsibility of executing the laws because of the burgeoning bureaucratic structure. Although this criticism is overstated, it nonetheless reflects the need for a more effective management system.

The current Administration has taken certain steps to rectify this situation. It established, by Executive Memorandum, a Regulatory Council, made up of agency heads, to coordinate regulatory policies and to establish inter-agency task forces in certain substantive areas of regulation. It also created The Regulatory Analysis Review Group (known frequently by its acronym RARG) which reviews major regulations and recommends policy changes where the group feels more cost-effective regulatory approaches are appropriate.

Clearly, strengthened executive management poses several difficult policy problems. For one thing, groups affected adversely by agency action may simply come to the White House for a second opportunity to fight a battle they lost before an agency. Moreover, an Administration, particularly in an election year, may be tempted to make decisions based on political concerns rather than strictly on the merits.

Nonetheless, the Committee believe it is desirable for the Chief Executive to provide guidance where regulatory policies overlap, and to ensure that the national priorities are made clear to more narrowly focused agencies. In examining the problems of executive oversight, the Committee was concerned that the issue was not adequately addressed in S. 262 and S. 755, as introduced. Accordingly, Senator Culver, Chairman of the Subcommittee on Administrative Practice and Procedure, proposed a Regulatory Policy Board directly responsible to the President, which would ensure that agencies act in a coordinated fashion and that regulatory reform requirements are taken seriously. To guarantee that regulatory and non-regulatory perspectives would be represented in the decision-making process of the Board, Senator Culver suggested that the composition of the Board consist of three regulators, three non-regulators, and the Administrative Conference.

The Committee feels that any meaningful regulatory reform legislation must address the need for reform of the process through a more effective, yet equitable, executive management system.

b. Better Congressional Oversight.—In recent years, many congressional leaders have begun a systematic agency-by-agency inquiry into the effectiveness of regulation. In the 94th Congress, the Subcommittee on Administrative Practice and Procedure scrutinized the impact of the regulatory policies and operations of the Civil Aeronautics Board, and issued a lengthy and detailed report on the results of the inquiry. *See* Senate Subcommittee on Administrative Practice and Procedure, Comm. on the Judiciary, "Civil Aeronautics Board", 94th Cong., 1st Sess., (1976). This report prompted congressional concern with the role of government interference in the airline industry and in 1978, the Congress passed airline deregulation legislation, introduced jointly by Senator Kennedy and Senator Howard Cannon. This was the first legislation to deregulate a major American industry.

Legislation to deregulate the trucking industry followed on the heels of airline deregulation in the 96th Congress. (*See* Comm. on the Judiciary, "Federal Restraints on Competition in the Trucking Industry: Antitrust Immunity and Economic Regulation", 96th Cong., 2d Sess., 1980.) Congress also enacted legislation to deregulate the railroad industry, (*see* Staggers Rail Act of 1980, S. 1946), and began consideration of legislation to reform regulation of the communications industry, and of the maritime industries. In addition, there has been heightened scrutiny of the health and safety and consumer protection agencies. One notable example is the debate over the Federal Trade Commission Authorization bill. *See* Federal Trade Commission Act of 1979, S. 1991.

Congressional oversight of the regulatory process has traditionally been sporadic and of limited effectiveness. (*See* Comm. on Government Operations, Study on Federal Regulation, S. Doc. No. 95–25, Vol. II 96th Cong., 1st Sess. (1977). *See also* American Bar Association, Commission on Law and the Economy, "Federal Regulation: Roads to Reform", pp. 105–111, 1979.) For the past few years, Congress has been seeking generic mechanisms to encourage a thorough review of regulatory policies and practices. Senator Muskie introduced "sunset" legislation, S. 2, which would require all federal programs, with few exceptions, to undergo a scheduled reauthorization of their budgetary authority. Senator Percy introduced an analogous bill S. 445, to "sunset" whole regulatory agencies. This legislation generated two serious concerns: (1) that sunset legislation would permit a regulatory program to be killed by congressional inertia or the dilatory tactics of a minority of Senators, and (2) that the legislation would create an unrealistic workload for congressional committees. In response to these concerns, in the 96th Congress Senator Kennedy proposed a compromise "sunset"-type provision (the "High Noon" proposal) to provide action-forcing procedures—other than the "sunset" termination device—which will encourage the President and Congress to review the substantive mandate of certain key regulatory agencies. This proposal is presently title III in S. 2147 and S. 262, as amended.

In sum, this legislation embodies three approaches to regulatory reform. First, using the "impact statement" approach, the bill requires agencies to list alternative ways to achieve their regulatory objectives, to pay special attention to the needs of small business, and to examine the potential anti-competitive effects of what the agencies do. Second, adopting the "procedural" approach, the bill amends and reorganizes portions of the Administrative Procedure Act. The third approach is reflected in the bill's provisions to encourage Executive supervision of the bill's implementation and to stimulate Congressional examination of individual agency programs.

C. JUDICIARY COMMITTEE ACTIVITIES ON REGULATORY REFORM LEGISLATION

The Judiciary Committee, which authored the Administrative Procedure Act of 1946, has primary responsibility in the Congress for reviewing legislation to improve the effectiveness and fairness of regulatory procedures. To fulfill this mandate, the Subcommittee on Administrative Practice and Procedure was established. In the 96th Congress, the enthusiasm over regulatory reform was reflected in the number and scope of the regulatory reform bills introduced by both Democrats and Republicans. This legislation includes omnibus bills as well as more limited proposals focussing on only one or two areas of regulatory reform.

This section will briefly describe the regulatory reform bills before the Committee.

1. S. 262, The Governmental Affairs Bill

In January, 1979, Senator Abraham Ribicoff introduced the Reform of Federal Regulation Act of 1979 (S. 262, 96th Cong., 1st Sess. (1979) which is premised on the recommendations of the Governmental Affairs Committee study of federal regulations published during the 95th Congress. The bill was jointly referred to the Judiciary and Governmental Affairs Committee with the condition that whichever Committee reported the legislation first, the other Committee was to have 45 days to act.

S. 262 as introduced, has five main elements. First, it would require agencies to issue an initial and final regulatory analysis of major rules, and to review their existing rules to ensure that they continue to be effective and efficient. Second, it creates less formal, more expeditious procedures for on-the-record administrative agency proceedings and for formal rulemakings. Third, it provides that Administrative Law Judges be appointed for 10-year terms and be subject to performance evaluations. Fourth, it provides funding for public participation in agency rulemakings. Finally, it restructures the Administrative Conference of the United States.

2. S. 755, The Administration's Regulatory Reform Package

In March 1979, Senator Ribicoff introduced the Regulation Reform Act of 1979 (S. 755, 96th Cong., 1st Sess. 1979) on behalf of the Carter Administration. This legislation had the same terms of referral as S. 262. Many of the provisions in the Administration's bill are based on Executive Order No. 12,044. S. 755 has the same four major provisions as S. 262 although there are some differences. Perhaps the most significant difference is the regulatory analysis provision. While S. 262 requires an agency to evaluate the economic impact of a major rule, S. 755 goes one step further and requires an agency to take the most cost-effective regulatory approach or to justify why not.

3. S. 1291, Senator Kennedy's legislation

On June 6, 1979, Senator Edward M. Kennedy introduced the Administrative Practice and Regulatory Control Act of 1979 (S. 1291, 96th Cong., 1st Sess., 1979) which had the same terms of referral as S. 262 and S. 755. S. 1291 contains five major proposals. First, it would increase opportunities for public participation in agency rulemaking proceedings by requiring an agency to engage in additional "hybrid procedures" for major rules. Second, it requires agencies to make publicly available ex parte communications which they receive concerning the merits of a rule. Third, it establishes a funding program to enable economically needy groups and persons an opportunity to participate in a meaningful way in agency proceedings. Fourth, it contains a proposal, derived from S. 382, the Competition Improvements Act, which requires agencies to take the least anti-competitive approach in achieving their statutory goals. Finally, it establishes a legislative mechanism, called the "High Noon" procedure, which requires the President and Congress to review and improve, on an agency-by-agency basis, the effectiveness of government regulation.

4. S. 299, Senator Culver's Regulatory Flexibility Act

The Regulatory Flexibility Act (S. 299, 96th Cong., 1st Sess. (1979) was introduced by Senator John Culver to relieve small businesses, organizations and small governmental jurisdictions of some of the burden of complying with Federal regulations and reporting and record-keeping requirements. This legislation directs agencies to "tier" their regulations so that smaller organizations do not have to meet compliance requirements that are beyond their resources. This legislation was referred only to the Judiciary Committee. S. 299 was signed into law on September 19, 1980.

5. Other Bills

The Regulation Procedures Improvements Act of 1979 (S. 93, 96th Cong., 1st Sess. (1979)), introduced by Senators Gaylord Nelson and Thomas F. Eagleton contains a regulatory analysis provision similar to that in S. 262 and S. 755 and three new proposals: (1) if an agency intends to issue a rule using a design, rather than performance, standard, the agency would have to publish a justification outlining its reasons; (2) when an agency determines that a rule will impose a "major" paperwork burden on more than ten people, it would have to prepare a paperwork impact analysis; and (3) if an agency rule is not re-promulgated within seven years of enactment, it would lapse automatically.

Senator Bumpers introduced legislation (S. 111, 96th Cong., 1st Sess. (1979)) which requires federal courts to give stricter scrutiny to agency rules, by requiring a *de novo* review of questions of law and by eliminating the "presumption of validity" which courts sometimes accord agency rules and regulations.

The Regulatory Reduction and Congressional Control Act (S. 104, 96th Cong., 1st Sess. (1979)), introduced by Senator Harrison Schmitt, is aimed primarily at providing Congress with a one-house veto authority over agency regulations.

The Rulemaking Improvements Act (S. 1969, 96th Cong., 1st Sess. (1979)), introduced by Senator Robert Dole, establishes a new standard for promulgation of federal regulations. Under the provisions of this bill, a new regulation could only become effective when an agency reasonably concludes that the benefits of a proposed rule would outweigh its cost and other adverse effects.

D. COMMITTEE HEARINGS

On May 10, the Judiciary Committee and the Subcommittee on Administrative Practice and Procedure began joint hearings on regulatory reform. At the first hearing, chaired by Senators Kennedy and Culver, the Committee heard testimony from Charles Schultze, Chairman of the Council of Economic Advisors; Dr. John White, Deputy Director, Office of Management and Budget; Dr. Donald Kennedy, Commissioner, the Food and Drug Administration; the Honorable Harold Leventhal, U.S. Court of Appeals; and Richard Stewart, Professor at Harvard Law School.

During the second hearing on May 15, the Committee heard testimony from Mark Green, Director of Congress Watch; Nancy Drabble, staff attorney of Congress Watch; Anthony Roisman, senior staff attorney for the Natural Resources Defense Council, Inc.; Jonathan Lash, senior project attorney for the Natural Resources Defense Council, Inc.; Michael Podhorzer, Legislative Director of the Consumer Federation of America; William Ross, Chairman of the American Bar Association's Administrative Law Section; Ira Millstein, attorney with Weil, Gotshal & Manges; and Philip Harter, attorney with Weil, Gotshal & Manges.

Between June and August, the Subcommittee on Administrative Practice and Procedure completed a series of in-depth hearings on regulatory reform legislation.

On June 13, the Subcommittee heard testimony from Douglas Costle, Administrator of the Environmental Protection Agency and Chairman of the Regulatory Council; John White, Deputy Director of the Office of Management and Budget; and Wayne Granquist, Associate Director for Management and Regulatory Policy of the Office of Management and Budget. The hearing centered on an examination of the experience under Executive Order 12,044 (43 Fed. Reg. 12,661) and the work of the Regulatory Council, as well as a review of the regulatory process in the context of S. 262 and S. 755.

On June 21, the Subcommittee held a hearing on the Regulatory Flexibility Act of 1979 (S. 299, 96th Cong., 1st Sess. (1979)). The following is a list of witnesses who appeared at the June 21 hearing: Peter Petkas, Executive Director of the Regulatory Council; Kenneth Robinson, Mayor of Bayard, Iowa; Robert Hatala, Mayor of Fort Madison, Iowa; Mert Domonoske, Mayor of Fallon, Iowa; Willis Fry, President of St. Francis Hospital, Waterloo, Iowa; Charles Linden, Administrator of Boone County Hospital, Boone, Iowa; Donald Dunn, President of the Iowa Hospital Association; Connie Wimer, Chairperson of the Des Moines Chamber of Commerce Small Business Committee; and Frank Swain, National Federation of Independent Business.

On July 18, the Subcommittee held a hearing on the constitutional and practical issues raised by proposals to subject agency rules to a legislative veto. The principal bill before the Subcommittee was S. 104 (96th Cong., 1st Sess. (1979)). The following is a list of witnesses who appeared: Senator Harrison Schmitt of New Mexico; Senator Sam Nunn of Georgia; Representative Elliott Levitas of Georgia; Charles Ferris, Chairman of the Federal Communications Commission; Griffin Bell, Attorney General of the United States; Murray Dry, Professor at Middlebury College, Vermont; Antonin Scalia, Professor at the University of Chicago Law School, Illinois; and Bernard Schwartz, Professor at the New York University Law School, New York.

On July 20, the Subcommittee held a hearing to examine the existing "public participation" program at the Federal Trade Commission and the issues surrounding public participation funding as it would be applied to all federal agencies. The following witnesses appeared at the July 20 hearing: Senator Alan Simpson of Wyoming, Thomas O'Neill, III, Lieutenant Governor of Massachusetts; Michael Pertschuk, Chairman of the Federal Trade Commission; Joan Claybrook, Administrator of the National Highway Traffic Safety Administration; Ben Blackburn, Southeastern Legal Foundation; Dan Popeo, Washington Legal Foundation; Dick Leighton, Grocery Manufacturers of America, Inc; Sally Determan, American Bar Association; Anthony Roisman, Natural Resources Defense Council; Jerry MacDonald, National Association of Home Insulation Contractors; and Nancy Drabble, Congress Watch.

On July 25, the Subcommittee held a hearing on agency rulemaking, intervenor funding, and the "High Noon" proposal. The witnesses included: Jeffrey Joseph, U.S. Chamber of Commerce; Thaddeus Holt, American Mining Congress; Jackson Browning, American Industrial Health Council; William Eberle, Committee for Economic Development; Larry Gold, AFL-CIO; Gerald Donaldson, Center for Auto Safety; A. Blakeman Early, Sierra Club; Richard Smith, Davis, Polk & Wardell; Douglas Parker, Institute for Public Interest Representation; and William Ross, Chairman of the American Bar Association's Administrative Law Section.

On July 26, the Subcommittee heard testimony on the expanded role of the Administrative Conference of the United States, proposed in S. 262 and S. 755, from Robert Anthony, Chairman of the Administrative Conference. There also was a debate between Alan Morrision of the Public Citizen Litigation Group and Lloyd Cutler, a partner in

Wilmer, Cutler & Pickering on the issue of allowing presidential intervention into the agency rulemaking process.

Testimony also was heard on the proposal of limited terms and evaluation procedures to reappoint, discipline or remove administrative law judges. Witnesses included: H. L. Kreiger, General Accounting Office; John Miller, attorney; Bernard Segal, attorney with Schnader, Harrison, Segal & Lewis; Althea Simmons, NAACP; Judge Harold Green, Association of HEW Administrative Law Judges; Judge William Fauver, Federal Administrative Law Judges Conference; and Judge Ernst Liebman, American Bar Association's Conference on Administrative Law Judges.

On August 8, the Subcommittee held a hearing on regulatory reform in Des Moines, Iowa. The witnesses generally supported the concept of regulatory reform, and particularly favored the provisions of S. 299. The witnesses included: Jack Bishop, Chairman of the Polk County Board of Supervisors; Tom Miller, Iowa Attorney General; Milton Stewart, Small Business Administration's Chief Counsel for Advocacy; Monroe Colston, Greater Des Moines Chamber of Commerce Acting General Manager and Chief Operations Officer; Lloyd Clark, Omega, Ltd.; Deborah Squires, Midtown Robo Car Wash; Roland Grefe, former President of the Iowa State Bar Association; William Bergman, Moyer & Berman; Thomas Tulley, Jr., Councilman, Dubuque, Iowa; Lloyd Sievers, Mayor of Altoona, Iowa; and Clarence Perry, County Engineer, Henry County, Iowa.

On August 20, Senator Leahy held a hearing on regulatory reform in Montpelier, Vermont. The witnesses expressed their general support for the concept of regulatory reform and for S. 299. The witnesses included: Karen Kent, Executive Director of the Vermont Retail Association; Christopher Barbieri, Executive Vice President of the Vermont State Chamber of Commerce; Stephen Crisafulli, President of Slalom Skiwear, Inc.; Tom Belville, Assistant to the President of the Vermont Labor Council; Ralph DesLauriers, President of Bolton Valley Resort; Frank Wall, E.F. Wall & Associates; Robert Davis, Manager of Cabor Farmers Cooperative-Creamery, Inc.; Glen Sulham, Manager of Member Services for the Barre Granite Association; and Dick Moot, President of Moot Woodturnings.

E. ACTIVITIES OF THE COMMITTEE ON GOVERNMENTAL AFFAIRS

In the 95th Congress, the Governmental Affairs Committee produced a detailed six volume study on the need for regulatory reform. *See* Comm. on Governmental Affairs, Study on Federal Regulation, S. Doc. No. 95–25, 95th Cong., 2d Sess. (December, 1977) (hereinafter referred to as the "Governmental Affairs Committee Study"). This report issued major recommendations in a number of areas: (1) the Regulatory Appointments Process; (2) Congressional oversight of regulatory agencies; (3) public participation in regulatory agency proceedings; (4) delay in the regulatory process; (5) regulatory organization; and (6) framework for regulation. The recommendations formed the basis for the comprehensive regulatory reform legislation, S. 262, introduced by Senator Ribicoff. In addition, it provided valuable insight for those concerned with improving the regulatory process.

The Governmental Affairs Committee held a series of eleven hearings on regulatory reform between March 20, 1979, and June 20, 1979. The Committee focused primarily on S. 262 (96th Cong., 1st Sess. (1979)) and S. 755 (96th Cong., 1st Sess., (1979)), as well as the Regulatory Reform Act of 1979 (S. 445, 96th Cong., 1st Sess., (1979)), introduced by Senator Charles Percy.

On April 15, 1980, the Governmental Affairs Committee ordered reported S. 262. This bill contained several additional proposals not originally in the legislation. Most importantly, it established a Regulatory Council and addressed the role of the Office of Management and Budget (OMB) in the regulatory reform process.

F. JUDICIARY COMMITTEE ACTION

On December 18, 1979, Senator Culver and Senator Paul Laxalt introduced the Regulatory Flexibility and Administrative Reform Act (S. 2147, 96th Cong., 1st Sess., 1979). The bill, co-sponsored by Senator Kennedy, Senator Thurmond, Senator Leahy, Senator Mathias, Senator Metzenbaum, Senator Hatch, and Senator Biden, represented a broad bi-partisan coalition of the Judiciary Committee. S. 2147 was referred jointly to the Governmental Affairs and Judiciary Committees.

S. 2147 incorporated, in revised form, all the major proposals from the omnibus regulatory reform bills before the Committee. This legislation had two additional features. First, it created a Regulatory Policy Board to consolidate existing regulatory oversight functions in the Executive Branch. Second, it required an agency to conduct a "regulatory flexibility" analysis, derived from S. 299, to reduce the unnecessary and duplicative paperwork and compliance burdens that federal regulations sometimes impose on small businesses, organizations and local governments.

On December 19, 1979, the Administrative Practice and Procedure Subcommittee voted unanimously to report S. 2147 to the full Judiciary Committee. The Judiciary Committee met on May 7 and voted to report S. 2147, as amended, and S. 262 (as amended by the substituted text of S. 2147), favorably to the Senate. S. 262, as amended, was reported to the Senate on May 29, 1980.

It was anticipated at the full Committee mark-up that efforts would be made to reconcile the Governmental Affairs and Judiciary Committee's versions of S. 262.

III. DISCUSSION OF MAJOR ISSUES

This portion of the report examines the key issues raised during the Committee's consideration of regulatory reform legislation. It also describes and explains the resolution of these problems by the Committee.

The 16 major issues in this bill can be roughly grouped into three functional categories for purposes of discussion. The order does not necessarily coincide with the sequence of topics addressed in the bill itself.

A. ANALYSIS OF REGULATIONS AND IMPROVED COORDINATION OF THE REGULATORY PROCESS

(1) Regulatory Analysis

The Committee recommends that agencies prepare a regulatory analysis before promulgating "major" rules. This analysis will ensure that agencies examine—and the public has an opportunity to comment on—the economic and non-economic impact of any proposed "major" rules. (See discussion of "major rules" in Section A(2)). Regulatory analysis is a central feature of the major regulatory reform proposals pending before the Congress. The analysis represents an important new management tool for regulatory agencies to use in evaluating the effectiveness of proposed regulations.

This tool has been derived from Executive Order No. 12,044 which the President issued in 1978 and which presently binds only Executive agencies. Because the regulatory analysis is a management tool, it has been established in a new chapter 6 of title 5 which creates a broad spectrum of new management requirements to improve the coordination and direction of the regulatory process.

The goal of regulatory analysis is to keep intact the underlying substantive statutory requirement which guides the agency's actions, while at the same time encouraging an agency to seek less burdensome ways of achieving its statutory goals. Because the Committee hopes that the agencies will seriously implement the regulatory analysis requirement, the analysis will be available to the Regulatory Policy Board for public comment. The analysis will also be available to the courts, in a limited way; however, because the Committee views the regulatory analysis primarily as a management tool, the courts are instructed not to review the sufficiency of the analysis itself.

DESCRIPTION OF REGULATORY ANALYSIS REQUIREMENT

Subchapter III of Chapter 6 requires an agency to prepare an initial and final regulatory analysis whenever it is required to publish a general notice of proposed rulemaking either pursuant to § 553(b) of title 5 or by any other law, and when it has determined that a proposed rule is a major rule under section 601(4) of this title.

The initial regulatory analysis provides a framework for the agency to assess the impact of the proposed rule on the economy and on various segments of the regulated and non-regulated communities. An initial regulatory analysis must be made available to the public without charge at the same time that the initial notice of the proposed rulemaking is published in the Federal Register.

In the initial analysis, the agency is required to discuss the basic reasons why it believes the action is necessary, to provide a succinct statement of the need for and objectives of the rule, and a discussion of the legal basis for the proposed rule. The initial analysis must also include projected reporting and recordkeeping requirements, along with other compliance requirements, and a discussion of other rules which may duplicate, overlap or in some way affect the proposed rule.

The agency is directed to discuss the significant alternatives which it might have substituted for the proposed rule and which are consistent with applicable statutes. In particular, the agency is required to consider less anti-competitive alternatives to the proposed rule. This provision, derived from Senator Kennedy's Competition Improvements Act of 1979, S. 382, reflects the Committee's belief that an agency should try to restrict its interference with the marketplace except where regulation is necessary to protect important public goals like health and safety. Finally, the agency is required to consider any proposals which might better accommodate differences between geographic regions or which would use performance rather than design standards. This provision is not intended to require an agency to spell out every conceivable alternative to a rule. Rather, it is designed to require an agency to enumerate only the most significant alternatives to the rule.

Section 622(b)(6) describes the economic assessment which an agency is required to make for a proposed major rule and for each significant alternative it has identified. For the initial regulatory analysis, the agency is directed to write a preliminary description of the projected economic effects, which should include both the compliance costs of the rule, the economic benefits to be gained from the rule, and also set out the projected health, safety, environmental and other effects which the rule is expected to have. Finally, the agency must give its appraisal of the anticipated effectiveness of each of the significant alternatives in meeting the objectives of the proposed rule.

Finally, the agency must allow at least 60 days for public comment on the proposed rule and the initial regulatory analysis following publication in the Federal Register before the final rule can be promulgated.

If an agency has published an initial regulatory analysis, or if it has proposed a rule and based on later changes in the rule or on the public comments determines that it should be a major rule, the agency must prepare a final regulatory analysis. The final regulatory analysis must be made available to the public without charge.

The final regulatory analysis must include a final assessment by the agency of the need for the rule; a description of the significant alternatives to the rule and why they were rejected; an analysis of the economic and other effects of the rule; a summary of the public comments on the initial analysis; a summary of the assessment by the agency of those comments; and a description of the reporting and recordkeeping requirements for compliance with the final rule.

The preparation of the regulatory analysis will not in any way affect the substantive standards which form the basis for the agency decision to issue a rule. Nor does the requirement to prepare a regulatory analysis alter in any manner the procedural standards which otherwise are applicable to agency action.

As has been stated before, the analysis should serve as a new management discipline for the rulemaking process by giving agencies an affirmative responsibility to identify the costs of proposed rules and other projected effects of the rule including the health, safety and environmental effects. If the statutes governing agency action in its area of responsibility conflict with the requirements of the regulatory analysis, the agency statute would not be affected by the requirement to prepare an analysis. For example, if an agency is prohibited from consideration of costs in the promulgation of a rule to limit public exposure to a dangerous substance, the requirement to perform a regulatory analysis in no way alters these statutory limitations.

The regulatory analysis is not designed to become a formalistic tally of figures which compares the economic costs with the anticipated economic or non-economic gains from issuing the rule. Agencies may also use more general descriptions of the effects of a proposed rule since, in many instances, quantification may be inaccurate or misleading.

THE LIMITATIONS OF FORMALISTIC COST/BENEFIT ANALYSIS

The Committee considered a number of legislative proposals which required an agency to weigh the costs of proposed regulations against the benefits. One proposal suggested an elaborate cost/benefit test requiring agencies to quantify, where possible, the costs as well as the benefits of proposed regulations, and to bar the implemenation of regulations unless the agency can demonstrate that the anticipated benefits exceed the costs. The Committee believes that such an approach is both unworkable and undesirable. Strict cost/benefit proposals have several drawbacks. In most instances it is impossible to develop an accurate measure of regulatory costs.

The benefits, too, are frequently not capable of being quantified. For example, while it may be relatively easy to assess the costs of limiting worker exposure to particles of a carcinogen in the air, it would be virtually impossible to provide an accurate assessment of the number of cases of cancer which would be prevented, along with the corresponding reduction of medical costs, by limiting worker exposure to this carcinogen.

This Committee recognizes the inadequacy of any strict cost/benefit analysis. The goal of regulatory reform is not the elimination of regulation, nor is it intended to slow regulation to a halt by requiring agencies to justify their regulations through unrealistic and cumbersome cost/benefit requirements. Rather, it is an effort to develop a mechanism for developing economically feasible methods of regulation consistent with important societal goals.

In a society as complex as ours, a substantial amount of regulation is necessary. It is necessary to protect the public health and safety and to protect the quality of the environment in situations where that protection exceeds the self interest of any corporation. More importantly, while everyone is concerned about the potential impact which regulation may have on business productivity and on inflation, reduction or postponement of government control of potentially harmful activities may result in far greater costs and corresponding inflation in the future.

For example, an investment of only $200,000 at the Life Sciences plant in Hopewell, Virginia, would have made it safe for the production of kepone. The failure of the company to make that expenditure led to the contamination of workers, the Hopewell water treatment system, and the James River. Already the legal judgments against Life Sciences total $12 million. The total damages awarded workers claiming nerve damage and sterility are unknown because some are still pending and others have been settled out of court. Finally, it is estimated that it will cost $8 billion to clean up the James River—if, in fact, that can ever be done.

Thus, it is hoped that the regulatory analysis will improve the quality of agency rulemaking and that it will not create an unrealistic obstacle in the path of effective regulatory action.

REGULATORY ANALYSIS IN FORMAL RULEMAKING PROCEEDINGS

Where an agency is required by statute to make its decision in a "formal" rulemaking on the basis of a record after opportunity, for public hearing, and the agency relies on external sources of information in the preparation of a regulatory analysis, Section 626(a)(2) requires the agency to include the information or a reference to the source of such information in the official record of the proceedings.

CONTRACTING FOR CONSULTANTS

The Committee is concerned that some agencies might view regulatory analysis as merely another document which can be contracted out to consultants and then stored in a dark corner of a regulatory file. Certainly this has been one of the problems in implementing Executive Order 12044. This practice defeats the purpose of the analysis as a decisionmaking document. As a result, this legislation provides that agencies may contract for the compilation of information which may at some point be used in the preparation of a regulatory analysis. However, the agency may not contract for the preparation of the analysis itself. This must be done by agency officials who participate in the development of the rule.

JUDICIAL REVIEW

The bill differs substantially from the other major regulatory reform proposals S. 262 and S. 755, as originally introduced, in the way in which it deals with judicial review of the regulatory analysis. Both of those bills specifically barred judicial review of the regulatory analysis. A number of administrative law experts, including the late Judge Harold Leventhal, who testified before the Committee on May 10, 1979, suggested that a court could probably examine this analysis, despite the specific bar to judicial review, in determining the validity of a rule since the analysis could be expected to contain the reasons set forth by the agency for the development of the rule. (*See Hearings on Regulatory Reform before the Comm. on the Judiciary*, 96th Cong., 1st Sess. 10 (1979) (hereinafter "Regulatory Reform hearings").)

The Committee chose to treat explicitly the limited role of the courts in the examination of the regulatory analysis. First, no determination by the agency or the Regulatory Policy Board concerning whether the provisions of Chapter 6 of this title 5 apply to any action by the agency—including a determination of whether a rule is or is not a major rule—shall be subject to judicial review. Based on the strong belief that Chapter 6 is primarily a management chapter designed to streamline and improve agency decision-making, the Committee believes that it would be counter-productive to subject any of those decisions to intensive *post hoc* judicial review and possible reversal.

Second, the Committee clearly states that the regulatory analysis required by sections 622 and 623 and the regulatory flexibility analysis required by sections 632 and 633 shall not be subject to judicial review. Nor is agency compliance or non-compliance with the provisions of this subchapter requiring preparation of the regulatory analysis, or of Subchapter IV requiring preparation of the regulatory flexibility analysis, subject to judicial review.

Third, the Committee provides that the contents of the regulatory analysis or regulatory flexibility analysis shall, to the extent relevant to an issue before the court, be available to and considered by a court when the court is determining the validity of the rule which is the subject of the analysis. When a challenge to the rule is instituted in a court, the regulatory analysis or regulatory flexibility analysis shall constitute part of the whole rulemaking record of agency action in connection with the review.

In any review by a court, the issue before the court is whether the rule itself is valid. The legislation is clear that the regulatory analysis and the regulatory flexibility analysis shall not themselves be the subject of judicial review. Thus, neither the manner of conducting regulatory analysis or regulatory flexibility analysis, nor the contents or sufficiency of the analysis is subject to judicial review. An agency's failure to comply with the regulatory analysis requirements is subject to correction by the Regulatory Policy Board, not the Judiciary.

The court will look at the statement of the basis and purpose published by the agency, along with its final rule, to determine whether the rule is valid when viewed in light of the factors which the agency is required or permitted by law to consider.

The Committee emphasizes that the standards of judicial review enunciated in Section 216 of this Act shall not in any way affect the judicial review of a regulatory analysis.

(2) MAJOR RULES

This legislation provides that agencies which promulgate "major" rules must engage in certain additional procedures, most importantly, the preparation of a regulatory analysis. The Committee believes that these regulatory procedures should be required only in a limited number and type of "major" regulatory activities where there is a significant impact on the economy. Otherwise, regulatory agencies would be forced to comply with these additional procedures for all regulations, even those with minimal effects on the American people.

Section 601(4) defines "major rule" as a rule that is estimated will have an annual effect on the economy of $100,000,000 or more; cause significant change in costs, prices for individual industries, geographic regions, or levels of government; have a significant impact on employment or the competitive process; or otherwise have a major impact. However, the term "major rule" does not encompass Internal Revenue Service (IRS) regulations because the Committee believes that most, if not all, IRS regulations are probably "major" and that the additional procedures required for major rules would impede the ability of the IRS to act effectively and expeditiously.

The $100 million figure was first used by President Ford in 1976 to implement his Economic Impact Statement requirement. The figure was incorporated in President Carter's Executive Order No. 12044 in

1977 and has subsequently served as a guideline for the agencies in determining whether or not to prepare a regulatory analysis. Testimony before the Committee has indicated that the $100 million figure has been successful as a "bright line" dividing important regulatory actions from unimportant ones.

The Committee believes that while the regulatory analysis is an expensive undertaking and should be limited to only those regulations which have a substantial impact on the economy, the definition should not be excessively rigid and limited to a dollar value alone. The Committee, therefore, has adopted an approach similar to the Administration's approach in Executive Order 12,044, which requires the agency to prepare a regulatory analysis when it finds that a regulation has a major impact on the economy even if that impact does not rise to the level of $100 million a year. The Committee estimates that under its definition approximately 150 major rules would be proposed each year.

To ensure that agencies fulfill their responsibilities for all major rules, the bill provides that the Regulatory Policy Board can review and overrule an agency's determination that a rule is, or is not, a major rule under the definitions contained in Sections 601 (4) (A) and (B). The Regulatory Policy Board cannot decide that a rule is a major rule on the basis of the definitions in Sections 601(4)(C) and (D) that a rule will have a significant impact on employment or the competitive process or that it will "otherwise have a major impact." The Committee made this distinction because of the open-ended nature of Sections 601 (4) (C) and (D).

The Committee believes that a decision by the Regulatory Policy Board that a rule is a major rule will merely trigger the requirement that an agency implement the additional procedures. This section does not give the Board the power to alter the contents of a regulatory analysis.

In addition to the preparation of a regulatory analysis, an agency must engage in the following additional procedures for a "major rule": prepare a statement that a rule is a major rule in the semi-annual agency agenda in Section 611; engage in hybrid rulemaking procedures in Section 626; review the continued validity of major rules in Section 641. In addition the Regulatory Policy Board is authorized to select for review the initial regulatory analyses of not more than 20 of the most significant major rules proposed in each year (except in exceptional circumstances the Board can review the initial regulatory analyses of more than 20 major rules).

The legislation clearly precludes in Section 629(a) any possibility of judicial review of an agency's determination or of the Regulatory Policy Board's determination that a rule is, or is not, a major rule.

(3) REGULATORY FLEXIBILITY[1]

The Committee recommends that agencies be required to perform initial and final regulatory flexibility analyses on all rules which are likely to have a significant economic impact on a substantial number of individuals, small businesses, small organizations and small governmental jurisdictions. In addition, agency heads are required to assure that individuals, small businesses and other small entities are given ample opportunity to participate in rulemaking proceedings.

The purpose of these provisions is to require agencies to solicit and consider alternatives to proposed rules which would minimize the burdensome effect on individuals and small concerns in a manner consistent with applicable statutes. Uniform regulations applicable to entities of all sizes have had a disproportionately adverse impact on individuals and small businesses, organizations and governmental jurisdictions. Agencies should be encouraged to seek ways to tailor their rules and reporting and record-keeping requirements to fit the size and resources of those subject to regulation. In this manner, the needlessly burdensome effect of rules which fall disproportionately on small entities with limited resources can be minimized.

LEGISLATIVE HISTORY

For several years the Committee's Subcommittee on Administrative Practice and Procedure has been studying the special problems of small businesses in complying with regulations.[2] Last Congress, the Committee unanimously adopted a bill drafted by Subcommittee Chairman Culver to deal with this issue. This measure, S. 1974, passed the Senate late in the 1978 session but the House of Representatives was unable to consider the bill prior to adjournment.

Senator Culver's bill was reintroduced in January 1979, as S. 299, the Regulatory Flexibility Act (96th Cong., 1st Sess. (1979)). Three days of hearings in 1979 focused on this bill and on the regulatory problems of small businesses, small organizations and small governmental jurisdictions: June 21, August 8 and August 20.[3] Based upon this testimony and hearings in 1977 and 1978 on this topic, the Committee determined that regulatory flexibility provisions were essential to any comprehensive regulatory reform legislation. A new subchapter IV on regulatory flexibility created in the bill contains a series of regulatory flexibility provisions modeled after those in S. 299.

THE NEED FOR FLEXIBLE REGULATIONS

When the government chooses to act through regulation by defining acceptable conduct through administrative rules, it faces squarely a basic tension in law: the inescapable conflict between uniformity and diversity, between rule and discretion, and between the "rough justice" of broad categories and justice tailored to the equities of individual situations. Peter H. Schuck, *Regulation: Asking the Right Questions;* National Journal (March 28, 1979), pp. 711–717.

Today, it is quite clear that government agencies nearly always choose the former of each of those alternatives. Regulations tend to be uniform in design, permit little discretion in their implementation, and implicitly assume that all those persons subject to them are basically alike.

The Committee has also found that these regulations of general and uniform applicability tend to place a disproportionate burden

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[1] This provision was enacted into law as S. 299 (P.L. 96–354) on September 19, 1980. Because this provision was contained in S. 262, as reported out of committee on May 29, 1980, we have provided an analysis of the provision in this report.

[2] *The Regulatory Flexibility Act, S. 1974; Hearings Before Sen. Judiciary Subcom. on Administration Practice Procedure*, Parts 1 and 2, 95th Cong., 1st and 2d Sess. (1977–78) (hereinafter "Regulatory Flexibility Hearings").

[3] *Regulatory Reform; Hearings Before the Sen. Judiciary Subcom. on Administrative Practice and Procedure*, Parts 3 and 4, 96th Cong., 1st Sess. (1979) (hereinafter "Regulatory Reform Hearings").

upon small businesses, small organizations and small governmental bodies. It is this basic fact—that uniform regulations often have a disproportionately greater economic impact upon small businesses and thus upon their competitive position—that underlies the regulatory flexibility provisions of S. 262 as reported by the Judiciary Committee.

Evidence supporting this finding comes both from practical experience and economic theory. The economic argument was articulated by Dr. Milton Kafoglis, then a member of the President's Council on Wage and Price Stability, in testimony before the Subcommittee on Administrative Practice and Procedure:

> There seem to be clear economies of scale imposed by most regulatory endeavors. Uniform application of regulatory requirements thus seems to increase the size firm that can effectively compete. The cost curve of the firm is shifted upward and to the right with its minimum point (or the elbow in an L-shaped cost curve) occurring at a larger output. If one employs the economists' theoretical "dominant firm" model and introduces such upward shifts in cost curves (the small firms' cost curve shifting more than that of the dominant firms), the share of the dominant firm will increase while that of small firms will decrease. As a result, industrial concentration will have increased. This hypothesis has not been questioned and is consistent with most of the case analyses that have been completed. It suggests that the "small business" problem goes beyond mere sympathy for the small businessman, but strikes at the heart of the established national policy of maintaining competition and mitigating monopoly. *Regulatory Flexibility Hearings*, Part 1 at 26.

The two major reasons uniform rules have this disparate effect on small entities were succinctly summarized by Alfred Dougherty, Jr., Director of the Bureau of Competition of the Federal Trade Commission:

> Why does "neutral" regulation have a differential impact on large and small firms? Two general observations should be made. First, even if actual regulatory costs are equal between competing large and small firms, small firms have fewer units of output over which to spread such costs and must include in the price of each unit a larger component of regulatory cost. Second, where small firms have smaller actual regulatory costs than large firms (as is generally the case), small firms remain at a competitive disadvantage because they are unable to take advantage of the "economies of scale" of regulatory compliance. Large firms generally already have extensive "in-house" data compilation and reporting systems and specialized staff accountants, lawyers and managers whose primary function is regulatory compliance. Small firms, by comparison, must either hire additional personnel or purchase expensive consulting services in order to acquire the necessary regulatory expertise. *Regulatory Reform Hearings*, Part 3 at 350–351.

This analytical explanation of the disparate impact of uniform rules upon small businesses and other small entities was supplemented by dozens of practical examples from hearing witnesses. Representatives of small businesses—organizations representing over two million small businesses testified in favor of the concept of flexible regulations—small organizations (schools and hospitals), and small governmental jurisdictions (towns and special assessment districts) all submitted numerous examples of regulations that could be made more flexible.[4]

Other practical difficulties faced by small entities in complying with rules include their limited access to capital either through retained earnings or public sale of stock compared to large businesses. In addition, small concerns traditionally must borrow heavily to make equipment modifications, finance inventory and otherwise keep their operation running. Even if small business can afford additional debt, banks and other lenders are often reluctant to loan money for improvement purposes not related to productivity.[5]

Recent studies have confirmed that this differential cost burden shouldered by small business can be very large. After an intensive analysis of small and moderate size businesses in the State of Washington, one such study concluded:

> [T]he theoretical predictions are strongly confirmed. Small businesses do face higher compliance costs in terms of dollars, hours and number of physical and work routine changes, then moderate size businesses. The mean cost level for small businesses is on the average *seven to ten times as high* as for larger businesses. [Emphasis supplied.] [6]

Other scholarly studies [7] and reports [8] fully support this finding.

The differential impact of rules on small entities is particularly evident with respect to reporting and recordkeeping requirements. As a recent staff study of the Joint Economic Committee reported:

> Federal paperwork is particularly burdensome for smaller businesses. Small businesses file over 305 million federal forms a year, totalling over 850 million pages and containing over 7.3 billion questions. The average annual cost to each small business is estimated to be about $1,270, a total cost of more than $17 billion.
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> The $17 billion figure is large, but it measures only the direct costs of paperwork compliance. Small businesses typically lack the manpower and specialized skills to respond quickly and efficiently to federal data requests. Too often

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[4] *Regulatory Reform Hearings*, Parts 3 and 4.

[5] Occupational Safety and Health Administration, *Occupational Safety and Health Administration's Impact on Small Business;* July, 1976, at 13; and *see* White House Conference on Small Business, *Final Report of the White House Commission on Small Business;* April, 1980, at 30.

[6] Batelle Human Affairs Research Center (Cole and Sommers), *Costs of Compliance in Small and Moderate Size Business: Final Report;* February, 1980, prepared under Contract 79-2668 of the Small Business Administration.

[7] Center for the Study of American Business (Chilton and Weidenbaum, *Small Business Performance in the Regulated Economy;* Working Paper No. 52; February, 1980; Small Business Administration (Burney), *The Cost of Government Regulation on Small Business*, undated; and Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance*, Special Study on Economic Change; June, 1980, at 6, 14, 18 and 27.

[8] White House Conference on Small Business, *Final Report of the White House Commission on Small Business;* April, 1980, at 14, 29, 53 and 85; and Department of Commerce, Advisory Committee on Industrial Innovation, *The Effects of Domestic Policies of the Federal Government Upon Innovation by Small Businesses*, Final Report; September, 1979.

> the time of the owner-operator is spent on paperwork at the expense of a careful monitoring of other activities essential to the survival and growth of the small enterprise.[9]

The effect was vividly described in several hearings by representatives of small businesses, small schools and hospitals and officials of small towns.[10] A similar conclusion was documented by the Commission on Federal Paperwork.[11] In a series of tables prepared by the Commission, several different government forms were analyzed and the costs were estimated by the size of the firm. For each of these forms, *without exception*, reporting costs per employee and per dollar of sales were higher for small businesses than for large ones.[12]

Criticism of rigid regulatory strategies was also heard from witnesses representing small education institutions and small communities. The conditions toward which many rules are directed often do not exist in smaller organizations and communities, and the complexity of meeting the requirements for participation in government programs discourages many small concerns from taking part. Ironically, these smaller organizations, businesses and communities are often the very populations toward which the programs are supposed to be directed.

All witnesses stressed that they do not view the bill as means of obtaining special advantages for the entities covered by the bill, but as a mechanism to help equalize the relative impact of federal regulations or create more equal access to the benefits of federal programs.[13] It is intended that this principle govern implementation of the bill by the agencies.

CURRENT AGENCY USE OF FLEXIBLE ALTERNATIVES

During recent years, flexible regulatory strategies have been used on a widespread but *ad hoc* basis throughout the agencies. An example of a two-tiered reporting requirement with which most Americans are familiar is the income tax form. Salaried persons earning less than $20,000 are permitted to file their tax returns on Form 1040A (the "short form"), while other taxpayers are required to fill out Form 1040 (the "long form"). In this instance, the Internal Revenue Service has made a determination that less information is necessary from low and middle income taxpayers with a single major source of income than is necessary from other taxpayers.

Milton D. Stewart, Chief Counsel for Advocacy of the Small Business Administration, presented a chart outlining all promulgated industry-specific regulations of the Environmental Protection Agency which explicitly take the size of the affected business into account.[14] The list included forty-eight different rules which provided either exemptions or accommodations on the basis of size.

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[9] Joint Economic Committee, *Government Regulation: Achieving Social and Economic Balance*, Special Study on Economic Change; June, 1980, at 14.

[10] *Regulatory Flexibility Hearings* Part 3, at 44, 47–50, 71, 136, 150, 156, 159–160; and *Federal Paperwork Requirements; Hearings Before the Sen. Select Comm. on Small Business, Subcom. on Government Regulation and Paperwork*, 96th Cong., 1st Sess. (1979).

[11] *Regulatory Flexibility Hearings*, Part 1 at 20, 63, 69–81; Part 2 at 4, Appendix F.

[12] *Regulatory Flexibility Hearings*, Part 2, Appendix.

[13] For example, *see* testimony of Robert S. Hatala, Mayor of Ft. Madison, Iowa, in *Regulatory Reform Hearings*, Part 3, at 32.36.

[14] Testimony of Milton D. Stewart; *Regulatory Reform Hearings*, Part 3, at 90–93.

Unfortunately, however, efforts to promote regulatory flexibility have until now been sporadic, lacking in overall Congressional guidance and, at times, ill-considered. For example, the General Accounting Office testimony drew attention to the Department of Energy's crude oil entitlements program, which has enabled smaller refineries to purchase crude oil at subsidized prices. An unintended consequence of this program was that 37 of the 38 refineries built in the United States between January, 1974, and September, 1977, were designed to process less than 40,000 barrels per day, the threshold of the entitlements program, whereas the minimum technologically efficient refinery size is 175,000 barrels per day.

The most direct and practical solution to counterproductive flexible regulations, as well as to burdensome uniform regulations, is to stimulate a much greater degree of participation in rulemaking by affected parties. Offering agencies the means for tailoring regulations to the resources of affected parties must be accompanied by a strong mandate to involve those parties in the deliberations. The most workable approach to this involvement is to require agencies to "solicit and consider" alternative, less burdensome regulatory strategies from the public.

This finding was more recently given additional weight by a Presidential Memorandum to the heads of Executive Branch agencies on regulatory flexibility for small business.[15] This memorandum, dated November 16, 1979, directs agency heads to ensure that existing and new rules "will be applied whenever possible in a flexible manner, taking into account the size and nature of the regulated businesses and organizations while fulfilling the social and economic goals of the underlying statutes." The President also sent letters to independent regulatory agencies requesting that they voluntarily consider taking similar action. This action is welcome evidence that the Administration believes the concept of flexible regulations for small entities is an idea whose time has come.

Apart from these administrative considerations, there also exists an important body of precedents in case law for the differential treatment of different segments of the regulated public. This case law, including Supreme Court decisions, has been summarized by the American Law Division of the Congressional Research Service with a finding that, "it would appear that legal precedent would generally support the type of regulatory classification you are proposing." [16]

PRESERVING STATUTORY OBJECTIVES

Senator Culver emphasized what has consistently been the goal of supporters of regulatory flexibility in his opening statement as the June 21, 1979 hearing:

> I want to note that it is not the purpose of these hearings or of S. 299 to undermine worthwhile federal regulatory efforts. It is not the aim of this legislation to allow the continuation

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[15] The text of this memorandum appears on pages 247–248 of the *Regulatory Reform Hearings*, Part 3.

[16] 123 *Cong. Rec.* S13,206 (1977) (remarks of Senator Nelson on S. 1974).

> of practices which are dangerous to workers, consumers or the environment.
>
> But the agencies which promulgate regulations in these areas must begin to consider the wide diversity of our economic and local governmental systems and try to tailor their regulatory requirements to the different circumstances which they face.[17]

Some witnesses expressed the concern that regulatory flexibility provisions not undermine agency statutory mandates. The focus of comments was the list of flexible alternatives contained in Section 632(b) of the bill. Witnesses noted that not all the listed alternatives would be appropriate to every rulemaking in every agency. As Mr. Peter Petkas, Director of the Regulatory Council, stated on June 21, 1979, to Senator Culver chairing the hearing:

> [B]usinesses should not be exempt from important social legislation simply because they are small. A small company may create a significant adverse effect on its employees or the surrounding community, particularly with regard to worker health and safety, the environment. You know as well as anyone in the Congress, because of your work in the Resource Protection Subcommittee, the devastation caused by Life Sciences, Inc., of Hopewell, Virginia, a small business manufacturing Kepone. The possibility of similar catastrophes will have to be avoided in every area where tiering is used.[18]

The bill makes clear that such environmental, health or safety catastrophes must never be made more likely because of flexible regulations. This is clarified in two separate bill sections. First, in Section 632(b), where agencies are required to describe any significant alternatives to the proposed rule which may minimize its impact on small entities, it is expressly provided that any such alternatives must "accomplish the stated objectives of applicable statutes". This same qualifying phrase is also placed in the next sentence of that section which introduces the list of flexible alternatives. This is to emphasize further that agencies are *not* required to adopt any of the alternatives listed in Sections 632(b)(1)–(4) that are inconsistent with the stated objectives of the statutes which authorize issuance of the proposed rule.

The second section which clarifies the intent of the bill in this regard is Section 636, entitled "Effect on Other Law." It succinctly states that this bill does not alter the *substantive* standard contained in underlying statutes which defines the agency's mandate.

The purpose of this section can perhaps best be made clear by discussing an example. Under the Clean Air Act, as amended, the Environmental Protection Agency (EPA) is charged with issuing national primary ambient air quality standards which are "requisite to protect the public health." 42 U.S.C. § 7409(b)(1). Courts have interpreted this standard to mean pollution sources must achieve the highest emission control level that is "technologically and economically feasible." *Bunker Hill Co.* v. *Environmental Protection Agency*, 572 F. 2d 1286 (9th Cir. 1977).

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[17] *Regulatory Reform Hearings*, Part 3, at 2.
[18] *Regulatory Reform Hearings*, Part 3, at 4.

The EPA recently adopted the "bubble concept" to give businesses the flexibility to think of reducing total emissions from an imaginary canopy, or bubble, placed over all the emission sources of a plant. If they find it is cheaper to tighten the control of a pollutant at one point and relax controls at another, they can do so as long as the total pollution from the plant does not exceed the sum of the current limits on individual sources of pollution in the plant.

The important point for purposes of this discussion is that the "bubble concept", a type of flexible regulation, in no manner altered the basic statutory substantive standard of the EPA: that it issue standards "requisite to protect the public health" or mandate the highest control level "technologically and economically feasible." This regulation is the purpose of Section 626 of the bill. No regulatory flexibility analysis alters the substantive standard of agency action otherwise applicable.

This section also clarifies that the requirements of the bill to publish regulatory flexibility analyses do not alter procedural requirements contained in other statutes applicable to the agency. For example, the Federal Trade Commission is required to follow certain special procedures in its rulemaking. The requirements of Section 632 and 633 do not alter their procedures. They merely require the Federal Trade Commission to perform regulatory flexibility analyses pursuant to this bill in addition to the procedures required by Magnuson-Moss.[20]

ADMINISTRATIVE EFFICIENCY

The concern of some witnesses that agencies are required to perform too many regulatory flexibility analyses has been addressed in Section 634(b). That section permits the agency head to certify that the proposed rule will not have any significant economic impact upon a substantial number of small entities. If such a certification is made and published, the regulatory flexibility analyses need not be performed.

The term "significant economic effect" is, of necessity, not an exact test. Because of the diversity of the community of small entities and of the rules themselves, any more precise definition might prove counter-productive. Any more specific definition would clearly require preliminary work to determine whether the analyses required by the bill is needed. But the same is true if the definition is a general line like "significant economic effect". Thus, there would seem to be little to gain and perhaps some to lose in terms of equity and flexibility by trying to predetermine what is a significant economic impact through definitional language.[21]

Among the factors which an agency should consider in determining whether a rule may have a significant impact on small entities are: (1) the type of business, organization or local government involved;

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[20] For other examples of legislation requiring "hybrid" rulemaking procedures, *see* the Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2629 (1976), and especially § 2605(c); Clean Water Act of 1977, P.L. No. 95-217, 91 Stat. 1566–1611 (1977), especially § 53(a)(2), 91 Stat. 1589–90 (to be codified at 33 U.S.C. § 1317). For a general description, *see* 2 Davis, Adminis-Law Treatise, § 6.10 (1978); Rodgers, *A Hard Look at Vermont Yankee*, 67 Geo. L. J. 699, 716–18 (1979).

[21] *See* Exhibit 16: Compilation of Answers of Witnesses to Common Questions; *Regulatory Reform Hearings*, Part 1, at 178–179.

(2) the compliance and reporting requirements likely to be involved; (3) the direct and indirect effects of the proposed regulation including the effect on competition; and (4) the relationship of the regulation to those issued by other programs and agencies which apply to the same class of regulated entity.

It is estimated that approximately 500 rules each year could be expected to have a significant enough impact on small business to require an agency to conduct a regulatory flexibility analysis, based on consultations with the Congressional Budget Office, the Office of Management and Budget and the Small Business Administration. To assure that agencies establish procedures to assess the impact of proposed rules on small entities, the Office of Management and Budget and the Small Business Administration are expected to consult with agencies to develop guidelines for applying this standard. The Small Business Administration has already prepared a useful outline in this regard.[22]

The term "substantial number" of small entities is intended to mean substantial number of entities within a particular economic or other activity. In other words, it is not meant to require that agencies find that a large number of the whole universe of small businesses, small organizations and small governmental jurisdictions would be affected by a rule. One particular rule may well affect a substantial number of school districts, for example, but have no impact on small businesses or organizations. Such a rule should be considered to have satisfied this portion of the test in such an instance.

Finally, it should be emphasized that regulatory flexibility should be considered a means of improving administrative effectiveness rather than additional bureaucratic burdens. Many social costs do indeed vary by the size of the entity and thus are a variable cost to society. The imposition of fixed and uniform standards upon all entities, in effect, treats variable costs as though they were constant costs. Forcing all entities to assume fixed financial obligations in such situations unfairly ignores the nature of the actual social costs involved.

Regulatory strategies which take variable costs to society into account actually stand a better chance of achieving the legislatively mandated goals of rulemaking, and of doing so without unnecessarily harming our smaller institutions, which employ more than 60 percent of the national workforce and produce most of the innovation leading to much needed increases in productivity.

As Senator Culver stated:

> I firmly believe that flexible regulations can be an important management tool for regulators. It will enable them to focus their efforts and resources where they will do the most good and where most of the problems reside. By placing the biggest burden on the broadest back, flexible regulations are more likely to be successful and less likely to generate the active hostility of those being regulated, which greatly diminishes voluntary cooperation.[23]

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[22] See *Regulatory Reform Hearings*, Part 3, at 98–99.

[23] Senator John C. Culver, *Special Consideration is Fair Treatment;* "The Voice of Small Business" (Guest Editorial) (National Small Business Association), July 1979.

(4) REGULATORY POLICY BOARD

The hearings on regulatory reform quickly raised the issue of management and coordination of federal regulatory policy. During the last decade, more regulatory agencies were established than at any time since the New Deal. The Congress passed legislation establishing a vast array of regulatory programs—many designed to protect the environment and health and safety—which reached into every business and community of the country. Altogether 56 new regulatory statutes were enacted and 7 new agencies were established.

As a result of this unprecedented regulatory growth, the Executive Branch began to struggle for ways to coordinate and manage conflicting regulatory programs, and to assist agencies in achieving their statutory goals in the most effective way.

The Administration responded to this administrative problem by initiating internal management efforts to coordinate overlapping and duplicative regulatory schemes. In a presidential memorandum, President Carter created the Regulatory Council, composed of the heads of the major federal regulatory agencies. The Council's tasks included publication of a regulatory calendar, which is a compilation of all major regulations to be proposed or promulgated by the federal government in the upcoming year, and analyses of the effect of government-wide regulation on specific sectors of the economy. By Presidential memorandum, President Carter also created the Regulatory Analysis Review Group (RARG), chaired by the Chairman of the Council of Economic Advisors. Using the staff of the Council on Wage and Price Stability, RARG reviews, analyzes and makes public comments on proposed regulations which would have the most serious economic effect on the nation's economy.

Finally, the Office of Management and Budget has some responsibility for ensuring that the regulatory reform activities are effectively implemented.

The Committee believes that the President's *ad hoc* structure for managing overlapping regulatory functions and overseeing the implementation of regulatory reform efforts is inadequate, and that more vigorous oversight of individual regulatory programs and regulatory reform efforts under the President's Executive Order 12044 (39 Fed. Reg. 41501) (1974), amended by Executive Order 11949 (42 Fed. Reg. 1017) (1976) is necessary. Indeed, in hearings before the Committee, John White, Deputy Director of OMB, conceded that there was a problem "clearly understanding" where the "lines of responsibility for executive management" run. (*See Regulatory Reform Hearings* at 36.)

The needfor strengthened management and oversight mechanisms in the federal government is not new. An evaluation of President Ford's inflation impact statement program under Executive Order 11821 found the implementation of the program was inadequate because certain agencies failed to take the requirements seriously. (*See generally* James C. Miller III, "Lessons of the Economic Impact Statement," *AEI Journal on Government and Society (July/Aug./1977).)* Regulatory Policy Board. The Board will be composed of three regulators, three non-regulators and the Chairman of ACUS. Its executive functions will be carried out by an executive director. The composition of the Board has the advantage of ensuring a strong oversight role through its majority of non-regulatory agency members while still maintaining the advice and experience of line managers from the regulatory agencies. The Administration has experienced significant benefits from the dynamic exchange between experienced regulators on the Regulatory Council. The Board's structure seeks to preserve those benefits.

The Board's functions will include those presently being exercised by the Regulatory Council: the preparation of a semiannual calendar of federal regulations, the elimination of overlapping and duplicative rules and the resolution of problems resulting from the cumulative impact of federal regulation on single sectors of the economy.

The Board also will assume the duties of the Regulatory Analysis Review Group by organizing inter-agency reviews of selected regulatory analyses and submitting public comments on these regulatory analyses. The Board will have government-wide responsibility for monitoring agency compliance with the regulatory reform provisions of this bill and will have the authority to overrule agency major rule determinations under the definitions contained in sections 601(4)(A) and (B). The Board will also be charged with consulting with state and local governments to devise model procedures and techniques for identifying and eliminating overlapping and duplicative reporting requirements by federal, state and local governments.

The Committee acknowledges that there is legitimate concern that the Regulatory Policy Board will be just one more federal agency to "regulate the regulators". However it should be stressed that the Board will consolidate and streamline existing functions within the Executive Branch and thereby make executive management more effective and less expensive.

(5) REGULATORY AGENDAS, CALENDARS AND DEADLINES

In addition to the regulatory analysis requirement discussed in the previous section, the Committee recommends several additional management devices: (1) that each agency publish a semi-annual agenda of rules which may be considered in the succeeding year; (2) that the Regulatory Policy Board publish a semi-annual government-wide "Calendar of Federal Regulations" listing all major rules likely to be considered in the following year; and (3) that agencies set deadlines for completing proceedings.

These recommendations are derived from the procedural requirements in Executive Order 12,044 issued in March 1978. On the basis of an independent survey of these requirements conducted by the Subcommittee on Administrative Practice and Procedure to evaluate agency implementation of these requirements under the Executive Order, the Committee has concluded that codifying and expanding these requirements is desirable.

REGULATORY AGENDAS

Section 611 requires each federal agency to issue a semiannual agenda, listing the regulations under development or review and a brief description of probable areas of regulatory inquiry over the succeeding twelve months.

The agenda, to be published in the *Federal Register*, shall list every regulation expected to be proposed or promulgated, with a brief description of the objectives and anticipated benefits of the rule, the legal basis for the issuance of the rule, and the proposed dates for agency action on the rule. If the agency estimates the rule to be a major rule (*see* section on major rules), the agency shall provide, to the extent practicable, a brief description of the economic impact of the rule.

For each area of regulatory inquiry, the agency shall describe the area of inquiry, including a statement of the objectives of the agency and an estimate of the likelihood that a major rule will evolve. Thus, in those cases in which agencies are contemplating regulations on newly discovered environmental problems or abuses in the marketplace, the agenda will be required to give the public notice that the federal government is pursuing remedial action to alleviate the problem. In this spirit, the agencies are instructed to invite suggestions from the public about each area of inquiry and are authorized to hold informational public meetings; to create *ad hoc* advisory committees; and to use such other techniques which the agency determines useful for obtaining suggestions.

Agencies will not be required to respond to suggestions received about the areas of inquiry, but are encouraged to utilize expertise from members of the public in pursuing these areas further.

In addition, the semi-annual agenda shall list the rules, policies, and practices scheduled for periodic review by the agency (see section on periodic review). Each agenda item is to include the name, address and telephone number of a responsible agency official who will be able to handle inquiries from the public.

Finally, since the agenda requirement is being recommended as a means for increasing public participation and improving in-house management, agencies should not be precluded from acting on matters not listed on the agenda. Such a bar could, if carried to the logical extreme, prevent the government from reacting to immediate crises with immediate remedial measures. Analogously, the agencies will not be required to promulgate rules on areas of regulatory inquiry which have been identified on a previous agenda. Such a requirement would run counter to a major thrust of the regulatory reform legislation; that is, to prevent the promulgation of unnecessary and duplicative regulations which tend to impose economic and other burdens on the society. If, in the latter case, an agency chooses not to pursue this area listed on the most recently published regulatory agenda, the agency shall include in the next agenda a brief explanation of its decision.

The requirement of a semi-annual agenda accomplishes both goals of Chapter 6: better management and better opportunity for public participation. First, under the Executive Order the regulatory agenda requirement has proved to be a much needed tool in providing agency managers with a comprehensive look at regulatory activities within their respective agencies. As Douglas Costle, Administrator of the Environmental Protection Agency, noted in a June 13, 1979 Subcommittee hearing:

> We at EPA have published three regulatory agendas and are working to set deadlines and meet them. I have been

> very pleased with the results . . . The agenda and deadlines for development of major rules are proving to be important management tools for me. They allow me to anticipate major decisions that will be coming my way, and to get involved early to help shape regulations from the outset. *Statement of Douglas M. Costle* in Hearings Before the Senate Subcommittee on Administrative Practice and Procedure, 96th Cong., 1st Sess. 18–19 (June 13, 1979).

Thus, the agenda affords the policy official an early opportunity to set the direction for regulation and see that staff resources are devoted to the agency's most important objectives. In a period where budgetary constraints on the federal government are ever-present, the agenda can serve as a "signal" to the official to allow him to allocate scarce staff resources between competing program goals.

Secondly, the agendas provide the public with early notice of upcoming rules and thereby take an important step to assure that alternative approaches and economic consequences will be adequately considered early in the process.

The Office of Management and Budget noted in its September, 1979 progress report on improving government regulations (Office of Management and Budget, *Improving Government Regulations, A Progress Report* (1979)) that trade association and public interest groups alike were better able to be notified of the status of on-going agency proceedings, allowing them to "make an educated prediction of the value and amount of agency actions" (*id.* at 14) which can be expected in the next succeeding six months.

As an assurance that the public is adequately notified of the contents in the agenda, the Committee believes that each agency should take whatever "outreach" steps are necessary. Such steps could include providing direct assistance to significant industries, trade associations, and consumer-based organizations in identifying regulations that will affect them, or instituting direct mailings of the agenda to frequently affected interests.

In the course of reviewing administrative reform proposals, the Committee considered requiring agencies to issue advanced notices of proposed rulemaking for major rules at the time the agency first decides to pursue an area of inquiry for a possible future rulemaking. This had been specifically proposed in Executive Order 12044 (43 Fed. Reg. 12,661 (1978)) and in S. 1291, the "Administrative Practice and Regulatory Control Act of 1979" (96th Cong., 1st Sess. 1979)).

This proposal received favorable comment from many sources. The American Mining Congress, testifying on July 25, 1979, especially endorsed this requirement as a measure which would "add significantly to the elusive goal of coordination of government agency activity; it could also provide Congress with enough lead time to resolve egregious statutory conflcits that the agencies themselves are incapable of resolving." *Testimony of Thaddeus Holt* Before the Senate Subcommittee on Administrative Practice and Procedure, 96th Cong., 1st Sess. (July 25, 1979), Trans. at 18.

Recognizing the success of the regulatory agenda requirement in Executive Order 12044 (43 Fed. Reg. 12,661 (1978)) the Committee felt that establishing dual requirements of publishing six month agendas for all rules and advanced notices for major rules would be duplicative. The advantages of agency planning earlier in the process and the encouragement of public comment at that time can be equally met with a requirement that the agenda be published every October and April of each year. By requiring the publication on these regularly scheduled dates, the public will be given an added tool to discover, in a predictable, organized fashion, the public policy areas in which their federal government is proceeding.

It is the Committee's belief that the agenda requirement is totally consistent with the legislative intent of the original authors of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*, 5 U.S.C. 701 *et seq.*) (1976). At the time of its enactment, the Congress was most concerned with increasing public involvement in the regulatory process. As the Senate Judiciary Committee reported:

> Matters of great import, or those where the public submission of facts will be either useful to the agency or a protection to the public, should naturally be accorded more elaborate public procedures. The agency must analyze and consider all relevant matter presented. The required statement of the basis and purpose of rules issued should not only relate to the data so presented but with reasonable fullness explain the actual basis and objectives of the rule. Senate Committee on the Judiciary, *Administrative Procedure Act*, S. Rep. No. 758, 79th Cong., 1st Sess. 15 (1945).

REGULATORY CALENDAR

Section 603(1) of this legislation requires the Regulatory Policy Board to develop and publish semi-annually, in November and May of each year, a "Calendar of Federal Regulations" which will offer a brief analysis of the major regulations likely to be under consideration by any agency in the twelve months following publication. To avoid duplication and waste of staff resources, the contents of the calendar will be adapted from the semi-annual agendas issued a month earlier by each agency.

Like the agenda requirement, the Calendar of Federal Regulations was derived from President Carter's Executive Order. Under current practice, the Calendar, published by the Regulatory Council, contains a listing of all major rules to be proposed or reviewed throughout the entire federal government.

The Calendar has served to identify the relationship between upcoming rules and to illuminate overlapping rules and areas of multiple impact on a single sector of the economy. The Committee hopes that the Calendar will enable the federal government to take more decisive and coordinated preventive action by forming inter-agency groups to deal with problems of regulatory conflict and overlap early in the process.

In addition, this comprehensive overview of proposed major regulations will serve as a signal for interested citizens, public and private interest groups, the business community, and all levels of government to become involved in the regulatory process.

DEADLINES

The problem of delay in the regulatory process has been described as "a fundamental impediment to effective functioning of regulatory agencies. Delay heightens frustration, impedes initiative and postpones action on pressing problems. Its economic and human costs are staggering; delay takes its toll on consumers, businesses, and government alike." (Governmental Affairs Study, vol. IV at 1.)

To combat the frequency of this problem, the Committee recommends the adoption of a deadline procedure for agencies to utilize in the promulgation of rules.

Section 612 requires agencies to establish and announce specific deadlines for completion of actions under 5 U.S.C. §§ 553–554 which the agency expects will require more than 120 days to complete. If the agency expects the action to take more than one year to complete, the agency shall establish and announce dates for completion of each major portion of the proceeding. Such announcements shall be included in the notice of proposed rulemaking made pursuant to informal or on-the-record proceedings (5 U.S.C. §§ 553–554).

The positive result of requiring agencies to set deadlines on their proposed actions will serve many important purposes. First, the deadlines will serve as a signal to alert agency management of significant problems and bottlenecks that require top-level intervention.

Second, agencies will be better able to evaluate the performance of their employees by monitoring their records in meeting set deadlines and calling upon the proper officials to explain delays if they occur.

Deadlines should also serve to inform members of the public as to the speed with which the agency wishes to deal with specific proposals, consequently enabling interested persons to plan their actions around the decisionmaking process. Alternatively, public scrutiny will encourage agencies to act within their publicized schedule.

In addition, deadlines will provide incentives for middle and lower level agency employees by reminding every individual that agency management is interested in each item being worked upon throughout the agency. It is the desire of the Committee that this will serve to foster more expeditious and improved agency action.

If agencies miss deadlines whether for completion of a proceeding or of a major portion of a proceeding, they will be required to publish in the Federal Register new dates for completion of the proceeding or a portion thereof along with a statement explaining they failed to meet the dates originally set. The Regulatory Policy Board is instructed to monitor the implementation of the deadline procedure.

Finally, under the current Administrative Procedure Act, a reviewing court is authorized to "compel agency action unlawfully withheld or unreasonably delayed." (5 U.S.C. § 706) (1976) Such judicial relief may be sought by any "person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. . . ."

Courts have rarely applied this provision to compel action and no clear definition of "unreasonableness" has surfaced. The Committee intends that any reviewing court faced with a motion to compel agency action will take into account the agency's performance in meeting its deadlines. It is anticipated that the creation of precise dates for agency actions will better enable federal courts to apply consistent and clearer standards to demand prompt agency responses.

(6) PERIODIC REVIEW OF RULES

The Committee believes that each agency should review all its major rules in order to evaluate their continuing effectiveness and to weed out unnecessary, out-dated, duplicative or contradictory regulations. Therefore, Subchapter V of the new Chapter 6 establishes a procedure and a framework for an agency's review of its major rules. In essence, it requires agencies (1) to review at least 50% of major rules in existence before the enactment of this legislation over the next five years; and (2) to establish dates, at the time a final rule is published in the Federal Register, for reviewing major rules which have been promulgated after the enactment of this legislation.

The Administration initiated a procedure for review of agency rules in Executive Order No. 12044. Section four of the Executive Order called for a periodic review of existing regulations by agencies in order to monitor the effectiveness, efficiency and continuing need for existing regulations. Two regulatory reform bills, S. 262 and S. 755, proposed agency review provisions similar to those in the Executive Order. The bills differed somewhat.

S. 262, as introduced, required agencies to review at least one of their rules each year. S. 755 provided for a more comprehensive schedule for reviewing rules, policies and practices by requiring that agencies review, over ten years, all rules (policies and practices) having an annual effect on the economy of $100 million or more and such additional rules as the agency might choose. S. 755 also provided that rules promulgated after its enactment must be accompanied by a date for their review.

In this legislation, the Committee recommends a procedure which falls between S. 262, as introduced, and S. 755, and adopts elements of both. It provides that ten percent of an agency's existing major rules (but not more than ten rules per year) must be reviewed each year for the next five years and no major rule can be adopted without carrying a date on which it would be reviewed under the provisions of this section. This proposal relies on the Regulatory Policy Board to take steps to coordinate, on a government-wide basis, the review of rules so that agencies with related rules can review them in a similar time frame. Recognizing the experimental nature of this type of program, the Committee did not establish a permanent, periodic review requirement. Instead, it provided that the President must examine the program after four years to determine whether continuance is warranted.

As a first step in conducting a comprehensive review of its rules, an agency must compile a list of all its major rules. Agency heads have assured the Committee that, with only a few exceptions, agencies can compile such a list in a short time. A draft schedule of rules to be reviewed over the five-year period is due eight months after promulgation of the legislation. It is anticipated that, given the fact that compiling the list of rules is a relatively simple task, the bulk of the eight months would be devoted to planning the review schedule.

An agency must review ten percent of its major rules each year, unless that amounts to more than ten rules, in which case the review would be limited to ten rules. In any year, an agency could take on the review of additional rules as it sees fits.

The list of criteria by which a rule would be chosen for review includes the following factors: (a) the extent to which the rule has significant effects on the economy, health, safety, energy, environment and other areas; (b) the extent to which the rule duplicates, overlaps or conflicts with other rules; (c) the length of time since the rule was adopted or became established; (d) the technical, economic, social or other changes which have taken place since the rule was adopted or became established; (e) the effectiveness and efficiency of the rule in achieving its stated objectives; (f) whether the rule can be easily understood by those who are affected by it; and (g) comments made by the public on the rule.

The draft review schedule includes brief statements of why each rule was selected for review and a date on which review of the rule would be complete. The legislation instructs the agency to review simultaneously similar rules and distribute the reviews evenly over the five-year period. The final review schedule is printed one year from the effective date of this legislation. Agencies are expected to invite, welcome and be responsive to public comments made in conjunction with a rule's review, including comments made on the draft schedule. To the extent feasible, the Committee hopes that different agencies will work closely with the Regulatory Policy Board in coordinating interagency review of similar, overlapping or conflicting rules.

The product of review would be an assessment containing an analysis of benefits, economic effects, costs and problems encountered in obtaining compliance with a particular rule or a notice of proposed rulemaking. If no changes in a rule are necessary, its review would be complete with the publication of the assessment. If members of the public disagreed with an agency determination that significant changes in the rule were not necessary, those persons could petition for a rulemaking procedure as provided in the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*). Information gained in the rule review might be used as part of the basis of that petition.

If an agency reviews a rule and determines that significant changes are warranted, these would be accomplished in a rulemaking procedure. Revocation of rules upon the completion of review would also be accomplished through notice and comment rulemaking. In this way, agency review of rules would coordinate with existing procedural provisions of the Administrative Procedure Act.

(7) REVIEW OF REGULATORY STATUTES AND PROGRAMS

(HIGH NOON)

Title III requires an agency-by-agency evaluation of the federal regulatory process in a systematic way. The Committee believes that an agency-by-agency approach is essential to comprehensive regulatory reform. Just as Titles I and II of this legislation are intended to improve agency rulemaking procedures under existing statutes, this Title focuses on the need for legislative action to augment the effectiveness of regulatory statutes.

This title supplements, but is not intended to replace, the normal congressional oversight process by requiring the President and the Congress to review 29 key regulatory agencies according to a fixed twelve year schedule. This title also mandates consideration of new legislation, where appropriate, to eliminate burdensome and costly regulation; to achieve more effectively important public goals like the protection of health and safety; and to rely upon less restrictive approaches to obtain statutory objectives. The proposal creates action-forcing mechanisms, such as discharge procedures [24] to expedite Congressional action on regulatory reform legislation. These mechanisms are similar to those found in the Congressional Budget and Impoundment Control Act of 1974 and the Trade Act of 1974.

The High Noon proposal is adopted from Title III of the Administrative Practice and Control Act of 1979, S. 1291 (Senator Kennedy). This title responds to the sentiment that the Congress has not effectively scrutinized the conduct of regulatory agencies and has not enacted sufficient new legislation to improve the regulatory process. The Governmental Affairs Committee's study on the oversight process states that although Congressional oversight has improved in recent years, it is still inadequate because it operates only on an *ad hoc* crisis basis. The Committee reported that a broader perspective is needed:

> Congress should, therefore, focus its oversight efforts on the broad direction of regulatory policy. There is something wrong when congressional time is devoted to worrying about whether carved beets can be called baby beets, when Congress takes time away from more vital health policy areas to focus on the number of vitamin capsules in a bottle. Oversight ought to have a broad perspective on policy which, presumably, reduces the specific occurrances of agency misbehavior.[25]

This proposal focuses Congressional attention on the broad direction of regulatory policy rather than on the minutia of an agency's daily activities. However, the proposal does not preclude careful legislative investigation where appropriate.

The Airline Deregulation Act of 1978 illustrates the need for greater Congressional scrutiny of existing regulatory policies. The Subcommittee on Administrative Practice and Procedure held extensive hearings on the impact of government regulation on the airline industry and found, in a lengthy, detailed report,[26] that government regulation prevented price competition, caused higher air fares, and restricted consumer choice. The Subcommittee report was followed by Congressional action to deregulate the airline industry.

According to the Governmental Affairs study,[27] these Congressional oversight hearings established broad policy objectives in the airline area which resulted in the first legislation ever to deregulate a major American industry. Similarly, legislation to reform federal regulation of the trucking industry passed the Congress in 1980 largely as a result of the exhaustive hearings held first by the Judiciary Committee and then by the Commerce Committee which looked into the anti-competitive effects of trucking regulation. (See e.g. Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, Oversight of Freight Rate Competition in the Motor Carrier Industry, 95th Cong. 2nd Sess. (1977.)

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[24] These procedures are discussed later in the text.

[25] Senate Comm. on Government Operations, Study on Federal Regulation, Vol. II, Congressional Oversight of Regulatory Agencies, 95th Cong., 1st Sess. II (1977) (hereinafter "Governmental Affairs Study".

[26] Sen. Subcom. on Adm. Practices and Procedures, Com. on Judiciary, Civil Aeronautics Board Practices and Procedures, 94th Cong. 1st Sess. (1975)

[27] Governmental Affairs Study at 85–91.

To overcome the deficiencies in the oversight process, the American Bar Association's Commission on Law and the Economy has recommended the creation of an institutionalized review procedure of the regulatory process:

> Although unnecessary or inappropriate regulation is contrary to the public interest, regulatory programs tend to survive longer than they should. Institutional inertia and the press of current business tend to defer governmental reconsideration of earlier decisions establishing such programs. The beneficiaries of regulatory policies may also find it in their interest to oppose changes. Such beneficiaries may be politically influential in Congress, and the costs of their benefits may be spread widely among consumers generally. All of these factors create practical obstacles to mobilizing adequate political support for a careful reconsideration of the value of any particular agency or function.
>
> The Commission believes that periodic governmental review of regulatory arrangements is essential, both to keep the multitude of such arrangements in reasonable harmony and to assure their relevance to current problems. Without such review, other measures to procure greater coordination, efficiency, and fairness in regulation have little hope of avoiding unwise proliferation of regulatory requirements. To assure that regulatory requirements serve the public interest and achieve the objectives set out in earlier chapters of this report, obstacles to effective governmental review must be overcome. An institutionalized review procedure, subject to schedules and deadlines, is essential for this purpose." [28]

This title establishes a review procedure with schedules and deadlines which is largely consistent with the Commission's recommendations. Unlike sunset legislation, this proposal does not mandate agency termination should Congress fail to act on regulatory reform legislation according to schedule.

The Committee feels that the Presidential involvement in the regulatory reform process and the action-forcing mechanisms in this title provide a strong incentive for meaningful regulatory reform while avoiding the pitfalls of sunset legislation.

The Committee believes that it is unwise to establish a periodic review of regulatory agencies. This proposal is an experimental program which targets certain key regulatory agencies for heightened scrutiny by the President and Congress over a 12-year period. The legislative mechanism in itself would terminate at the end of the 12 years. If the procedure proves successful in improving the effectiveness of government regulation, the mechanism can be revived. The proposal does not, in any way, foreclose the ability of individual committees to scrutinize agency practices independently of, or in addition to, the mandated review scheduled.

The title establishes a two-stage legislative mechanism which requires the President and Congress to evaluate the effectiveness of certain regulatory agencies. The timetable governs Presidential and Congressional review of 29 regulatory agencies between 1982 (before the 98th Congress) and 1994 (the 103rd Congress). The list of agencies does not include all government agencies that issue regulations, but targets those agencies, or series of agencies, which have a significant impact on the economy.

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[28] American Bar Association, Commission on Law and the Economy "Federal Regulation: Roads to Reform" 105, (Final Report 1979 with Recommendations.)

The agencies are divided into six general categories: energy; environment and natural resources; transportation and communications; consumer protection; commerce and international trade; and banking and finance. All of the agencies in one category will be evaluated in a single Congress. Thus, in the 98th Congress, agencies concerned with energy—The Nuclear Regulatory Commission, The Federal Energy Regulatory Commission, and The Department of Energy—are subject to review. In the 99th Congress, agencies concerned with the environment and natural resources are scheduled for review, and so on. The proposal ties all mandated Presidential and Congressional actions to this review schedule.

In the first stage of the review process, the President, acting on the advice of the newly established Regulatory Policy Board, must propose a regulatory reform bill which, wherever possible, will eliminate unnecessary regulation and improve the effectiveness of necessary regulation. The Board initially evaluates the agencies scheduled for review and then prepares recommendations for the President which explain the need for reform of an agency scheduled for review and which suggest legislation to accomplish the reforms. The proposal establishes a framework for evaluating the agencies and the effectiveness of the regulatory reform legislation under consideration. This framework, set forth in Section 305(a), requires the Board to consider, among other things, reforms which will achieve the statutory goals of the agency by less restrictive or non-regulatory means, including the use of taxes, penalties, market-based incentives, bargaining techniques, required disclosure, or the creation of new causes of action.[29]

The legislation structures the Board's evaluation process to ensure a fair and balanced approach in formulating the regulatory reform recommendations. The Board must obtain the perspectives of the Secretary of Labor, the Chairman of the Federal Trade Commission, the Special Assistant to the President for Consumer Affairs, the Administrator of the Small Business Administration, and five individuals who broadly represent regulated interests, small business, labor and consumer interests.

The Board is required to invite the head of the agency subject to review to participate in the evaluation process. In addition, the Board must submit its legislative recommendations to the President by May 1st of the second session of the Congress before an agency is scheduled for review. The President then has approximately five months (until October 1st) to prepare regulatory reform legislation and a report, and submit them to the Congress.

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[29] For a more detailed discussion on the framework see American Bar Association, Commission on Law and the Economy, "Federal Regulation: Roads to Reform" (Final Report 1979 with recommendations), in particular Chapters 3, 4 and 7; S. Breyer, "Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform" 92 Harv. L. Rev. 549 (1979); Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., Study on Federal Regulation, Vol. II, "Congressional Oversight of Regulatory Agencies."

Section 306 makes clear that the President, and not the Board, has the statutory responsibility for submitting the regulatory reform legislation and report to the Congress. In the report, the President must describe and analyze the proposed reform legislation according to the regulatory review framework. In addition, the President must analyze the impact of the agency's regulatory activities on specific industries, geographic regions, consumer groups, the environment, and health and safety, and analyze whether the statutory goals of the agency conflict with other federal statutes.

If the President determines that a regulatory reform bill is inappropriate or unnecessary, he must set forth his reasons in the report. For example, the President might decide that legislation is unnecessary because an agency can achieve the needed reforms administratively.

Once the President's regulatory reform bill and report are sent to Congress, the second stage of the procedure begins. The legislation is referred to the appropriate Congressional Committees which have until March 15 of the second session of the Congress to scrutinize, amend and report out the regulatory reform legislation. If the Committee fails to report out the bill by this deadline, a motion to discharge the bill can be used to force the bill to the floor of the Congress. This motion can be made only by an individual favoring the bill and only if supported by one-third of the Members of the house involved. If the motion receives the support of a majority of the Members involved, the Committee has 30 days to report the legislation before it is discharged from further consideration of the legislation.

(8) ATTORNEY GENERAL INTERVENTION

Section 217 of the bill authorizes and encourages the Attorney General to appear as an intervenor in certain economic regulatory proceedings and in any action to obtain judicial review of such proceedings to discuss the effects of an agency's rules or policy on competition and the availability of less anti-competitive alternatives which would achieve the agency's statutory goals. This section is derived from the Competition Improvements Act of 1979, S. 382, introduced by Senator Kennedy.

This provision focuses on four kinds of economic regulatory proceedings which, in the Committee's opinion, most directly involve government intervention in the competitive process to remedy defects in the operation of the market by: regulating entry under a scheme in which the level of entry is limited; setting or reviewing prices; setting, limiting, or allocating economic output; or reviewing agreements among competitors. The section does not include regulation intended to achieve social goals, like the protection of health and safety, to which the market process is less relevant.[30]

The discretionary nature of this section permits the Attorney General to focus agency attention on competitive concerns only where those concerns are most relevant. The section facilitates the ability of the Attorney General to intervene effectively by requiring each agency to establish procedures that notify him of pending agency proceedings subject to this section.

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[30] Testimony of Assistant Attorney General John G. Shenefield, Hearings on the Competition Act of 1979, Senate Committee on the Judiciary, S. Doc. No. 96-13, 96th Cong., 1st Sess., 48 (1978).

Section 217 is not intended to change, modify, or repeal any powers which the Attorney General, or any other federal official entrusted with enforcing the antitrust laws, has under present law.

The Committee believes that the Attorney General's expertise in issues concerning the nation's antitrust laws and policies should be seriously considered by regulatory agencies. Under existing law, every regulatory agency has the responsibility to consider the impact of its regulatory activities on competition, and to promote "competition, where appropriate, rather than sanctioning unjustified and unnecessary anti-competitive activities." [31]

Courts have long considered the promotion of competition as an important factor in determining whether an agency has fulfilled its statutory duty to regulate in the "public interest". In *Bowman Transportation Inc.*, v. *Arkansas-Best Freight System Inc.*, 419 U.S. 281, 298 (1974), the Supreme Court emphasized the strong congressional policy in favor of facilitating the competitive market structure even where regulation is used to accomplish important public goals:

> A policy in favor of competition embodied in the laws has application in a variety of economic affairs. Even where Congress has chosen Government regulation as the primary device for protecting the public interest, a policy of facilitating the competitive market structure and performance is entitled to consideration.

Over a decade ago, in the landmark case, *Federal Maritime Commission* v. *Aktiebolaget Svenska, Amerika Linien*, 390 U.S. 238, 244 (1968), the Supreme Court held that "[b]y its very nature" an illegal restraint of trade is "contrary to the public interest," and affirmed a decision by the Commission disapproving an anti-competitive agreement between two steamship conferences.

Following the Supreme Court's lead, many federal courts have overturned regulatory decisions where the agency has failed to consider competition in determining whether their regulations serve the public interest. In the recent case, *P.C. White Truck Line, Inc.* v. *Interstate Commerce Commission*, 551 F. 2d 1326 (D.C. Cir. 1977), the District of Columbia Court of Appeals, in a *per curiam* opinion, reversed an Interstate Commerce Commission (I.C.C.) decision denying an application for a certification of public convenience and necessity authorizing certain motor carrier operations. The Court, stressing the importance of competition, held that the Commission had "disregarded competition as a factor worthy of attention" and thereby failed to consider "the contribution that increased competition might make to the public weal." [32]

In the following year, in *United States Lines Inc.* v. *Federal Maritime Commission*, 584 F. 2d. 519, 531 (D.C. Cir. 1978), the D.C. Circuit Court articulated a strong presumption in favor of competition when it overturned an F.M.C. decision approving a joint service agreement between two common carriers because it held that the F.M.C. "must at least demonstrate that it has considered the antitrust implications and has found that the public interest supports approval notwithstanding the possible anticompetitive effects."

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[31] Committee on the Judiciary, Report on Competition Improvements Act of 1976, 94th Cong., 2d Sess. (1976) (Dissenting views of Roman Hruska, Strom Thurmond, William L. Scott); *See also* Economic Report of 1976, Presidential Documents: Gerald R. Ford, 1976, Vol. 12—No. 5, pp. 82-83. (President Ford called for the elimination of government policies and institutions which interfere with competition.) National Commission for the Review of Antitrust Laws and Procedures, Report to the Attorney General 177 (Jan. 22, 1979) (The Commission called on all regulatory agencies to take the least anti-competitive method of achieving their regulatory objectives to be consistent with the Nation's antitrust policies.)

[32] In the same year, in *Sawyer Transport, Inc.* v. *United States*, 565 F. 2d. 474 (7th Cir. 1977), the Seventh Circuit Court overturned another I.C.C. determination because it "ignored" "the possible public benefit from increased competition." *Id.* at 478.

Thus, by prompting more active intervention by the Attorney General in agency proceedings, this section enables an agency to fulfill its statutory duty to consider the effects on competition of its activities and, in certain circumstances, to take the least anti-competitive approach to achieve its statutory goals.

(9) INTERAGENCY COORDINATION

Subchapter IV of new Chapter 6, proposed by Senator Alan Simpson, is designed to improve agency coordination of federal rules and policies. Too often federal agencies issue rules without conferring with other agencies which have relevant regulatory expertise or related statutory mandates. As a result, there has been a growing problem of overlapping, duplicative, and inconsistent federal regulatory policies. Dr. Betty Bock, of the Conference Board, testified to this Committee concerning the problem of conflicting regulatory policies:

> This is so because the policies of different regulatory agencies often conflict because of differing Congressional mandates under which they operate. Each agency focuses on its own enabling statute and legislative history; its own rules, procedures, and precedents; court decisions in cases it has brought; and on what it perceives as its popular mandate at particular times. It is, therefore, not surprising that an agency tends to try to carry out its own perceived obligations, regardless of whether its actions conflict with those of other agencies.[33]

Testimony before this Committee indicated that conflicting policies are undesirable for two reasons. First, they create serious problems for regulated industries trying to comply with the law. Second, they make it significantly more difficult to achieve national priorities. Better inter-governmental coordination is clearly in order.

This section, proposed by Senator Alan Simpson, would help to eliminate the problem of conflicting regulations by encouraging agencies to coordinate their regulatory actions with other parts of the Executive Branch. It requires fifteen enumerated agencies to notify other designated agencies about pending rules in order to give them an opportunity to submit comments on the rule. For example, the Department of Energy is required to notify the Council of Economic Advisors, the Antitrust Division of the Department of Justice, the Nuclear Regulatory Commission, and the Environmental Protection Agency about its pending rules. The agencies must be notified as soon as possible, and no later than the publication of the notice of proposed rulemaking in the Federal Register. The Regulatory Policy Board is empowered to designate additional agencies to comment on the rules.

Each agency notified of a pending rule may make written comments concerning the rule within a reasonable time after the publication of the notice in the Federal Register.

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[33] Regulatory Reform Hearings at 460.

Because of the important role of regulatory policies developed through agency adjudication rather than rulemaking proceedings, the Committee feels it is important to establish a procedure for developing inter-agency coordination of regulatory policies. Therefore, this section provides that the Regulatory Policy Board may request agencies to comment on the policies of another agency.

In order to facilitate effective Presidential coordination of the activities of the Executive Branch, an agency is required to forward its comments to the Office of Management and Budget simultaneously with its transmittal of the comments to the notifying agency.

The requirements of this section are not subject to judicial review. However, to the extent that the written comments of the agency are placed in the regulatory file, the comments shall be considered part of the whole rulemaking record of agency action in connection with review of the rule. This section is not intended to affect the exemptions in Section 552(b) of the Freedom of Information Act.

(10) THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

The Committee recommends that the Administrative Conference of the United States ("ACUS" or "the Conference") be given the responsibility for selecting and re-assigning administative law judges and for establishing procedural rules for agency proceedings under the revised Administrative Procedure Act.

ACUS was established in 1964 by Congressional action (5 U.S.C. §§ 571-576).

> [T]o provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information and develop recommendations for action . . . to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest. (5 U.S.C. § 571)

The Conference was given the task of (1) identifying causes of inefficiecy, delay, and unfairness in administrative proceedings affecting private rights, and (2) recommending improvements to the President, the agencies, Congress, and the courts. It has no authority to require implementation of its proposals and instead "must rely upon persuasion and inherent merits of the recommendations themselves."

Under its present structure, ACUS is headed by a Presidentially-appointed chairman, who serves with the advice and consent of the Senate for a five-year term. The full Conference is composed of 91 members, selected for their degree of expertise and activity in the federal administrative process, and includes the chairman, ten others appointed by the President to the "ACUS Council" (five from government, five from outside the government), who may also recommend subjects for study, consider reports, and exercise budgetary and policy supervision over the Conference, 44 agency heads or their designees, and 36 representatives from the private sector.

ACUS has been active in the last few years in its "research and recommend" position. Among those projects recently completed are studies of the hybrid rulemaking procedure in use at the Federal Trade Commission (pursuant to the Magnuson-Moss Warranty-

Federal Trade Commission Improvements Act of 1975 (15 U.S.C. § 2301)), methods of reducing delay in rate-making cases, and methods for improving procedures in social security disability cases.

In addition, the Conference has taken an active role in advising agencies on implementing government-wide regulatory reform initiatives from Congress and the White House. In this context, it has called upon agencies to adopt deadlines for their rulemaking procedures, issued a guide to agencies on the implementation of the President's regulatory reform order of March 23, 1978 (Executive Order No. 12044), advised agencies on specific compliance problems with the Sunshine Act (5 U.S.C. § 552b), issued guidelines on ex parte communications, and scheduled management seminars on coordination and management for chairmen and commissioners of federal regulatory agencies.

LEGISLATIVE PROPOSALS

Due to the Conference's uniquely broad oversight ability, ACUS has been viewed as a potential recipient of substantially increased authority for implementing reform measures in the regulatory process.

S. 262, for instance, proposed restructuring of the Conference by altering the membership component and replacing that with a single-office Presidentially appointed administrator and deputy administrator who would manage a small staff to issue studies and fulfill other responsibilities.

The Conference, under S. 262, as introduced, would then be given a number of new functions, including evaluating administrative law judges, serving as a "citizen ombudsman" in monitoring compliance with laws of general applicability, such as the Freedom of Information Act (5 U.S.C. § 552), the Privacy Act of 1974 (5 U.S.C. § 552a), the Federal Advisory Committee Act (5 U.S.C. App. I (Supp. II 1978)), etc. issuing guidelines to control paperwork, participating as amicus curiae in court cases involving significant issues, and distributing funds for participation expenses to qualified applicants.

By contrast, S. 755 simply proposed a minor amendment to the Conference's authorizing act (5 U.S.C. § 573) which would encourage the selection of public members with more diversified backgrounds. In addition, the Conference was to receive newly vested powers in evaluating and selecting administrative law judges.

S. 1291 also proposed leaving the structure of ACUS intact but awarded several new functions to the chairman. These new functions included creating a uniform subject matter index to be used by agencies commenting on conflicting or duplicative agency rules; receiving and evaluating complaints that an agency had not complied with the Freedom of Information Act (5 U.S.C. § 552), the Administrative Procedure Act (5 U.S.C. § 551), etc.; overseeing the Federal Register operation; and monitoring the Federal Reports Act (44 U.S.C. § 3501). Most importantly, the Conference was given the authority to promulgate new procedural rules which would be binding on the agencies. These rules would be analogous in function to the Federal Rules of Civil Procedure.

COMMITTEE ACTION

This legislation maintains the present structure of ACUS and gives the chairman added responsibilities. In order to ensure that the Administration have the ability to hold the chairman accountable for leadership and dedication to the position, the chairman is given a four-year term coterminous with that of the President.

Although several witnesses in the course of the regulatory reform hearings asserted that ACUS should be transformed into a strong, independent regulatory agency to serve as a "center for regulatory management", the testimony nearly unanimously agreed that the structure of the Conference be left unchanged. As Robert Anthony, recently retired chairman of the Conference stated in a July 26, 1979 hearing:

> [T]here are substantial advantages and only negligible costs in retaining a fairly numerous membership representing the major agencies and important constituencies. The members, individually and collectively, contribute judgment, information and experience. . . . Within this realm such a membership supplies an organized forum for the many agencies and public constituencies whose participation would have to be sought anyway. The deliberative processes of the Conference test and refine proposals for procedural improvements and enhance the quality and acceptability of all the Conference's work. (Testimony *of Robert Anthony before the Subcommittee on Administrative Practice and Procedure, July 26, 1979, pp. 12–13*)

The Committee believes that the Conference should not be an "independent" regulatory agency consisting of a limited number of appointed members overseeing a great number of regulatory activities. Maintenance of a broad-based membership in the Conference offers a unique ability to bring agency officials together with members from the private sector to discuss the practical implications of agency actions, problems of implementation, and the accompanying effect on the private sector. In order to serve this purpose better, the Committee recommends that at least one-fourth of those selected by the chairman be representative of small business, consumers, or other groups significantly affected by regulatory activities.

The expanded roles for ACUS appear inappropriate at this time as most are being performed adequately elsewhere. Agency compliance with the Freedom of Information Act (5 U.S.C. § 552), for instance, is adequately monitored by the Department of Justice's Office of Information Policy, which was given oversight authority by Congress; and the Federal Reports Act (44 U.S.C. § 3501) is implemented by the General Accounting Office.

As Anthony L. Modello, a member of the Conference, stated:

> It has been my experience that agencies tend to resist examination of the decision-making process for substantive policy when it is conducted by outsiders, but seem not to reflect the same concerns when outsiders examine into administrative matters. Also it has always seemed wasteful to me, after Congress has created an agency and given it funds to perform its function, to throw up one's hands when the program fails—and instead of insisting on better performance, create yet another agency principally to insure

> that the failing agency does its job." (Letter of Anthony L. Modello to Senator John C. Culver, dated August 30, 1979)

The Committee, recognizing these concerns as well as striving to take advantage of the expertise of the Conference, recommends that the Conference be assigned a limited number of important, new functions, each related to improving the administrative process.

First, this legislation awards the chairman new authority to administer the selection and re-assignment of administrative law judges. In order to prevent the "politicization" of the section process, the Conference is a proper vehicle for this authority due to its existence "outside" of the agencies. The Committee determined that administrative law judge selection and management are properly placed in the office of the chairman of ACUS.

The chairman will be vested with authority to establish qualification requirements for administrative law judges (in consultation with the Office of Personnel Management) and will be required to adopt and administer a system for examining and selecting administrative law judges. In addition, the chairman will be empowered to certify from the register of eligibles the names of ten candidates with the highest ratings from which agencies will select qualified individuals to fill position vacancies. Finally, the chairman will establish and from time to time revise the maximum number of administrative law judges that may be placed in eligible positions, order the re-assignment of administrative law judges from agency to agency as appropriate, and disseminate information and recruit qualified administrative law judge candidates from all groups.

Secondly, the Committee hopes to improve the quality of agency procedures by establishing a committee within ACUS to fashion a set of procedural rules for use in conducting proceedings under the revised Administrative Procedure Act. These procedural rules are intended to govern administrative proceedings the same way that the Federal Rules of Civil Procedure govern judicial proceedings. For example, these rules could establish standardized deadlines for filing motions.

S. 1291 had originally proposed that the Conference establish rules which bind all agencies, with measures available to "waive" their application in extraordinary circumstances. However, former Chairman Anthony pointed out that

> If they [the rules] are to be binding, there will be a natural temptation to deal with every foreseeable special circumtance, and they might detract from the value of the rules as models of good procedure.
>
> If the rules are advisory only, they can be drafted with a view to making them acceptable to most agencies. (Statement of Robert Anthony before the Subcommittee on Administrative Practice and Procedure, July 26, 1979, fn. 5)

Most importantly, experience indicates that even rules on apparently simple and non-controversial subjects may pose difficulties if applied uniformly. The great diversity in current formal procedures being used by agencies, from the Nuclear Regulatory Commission to the Federal Trade Commission, makes it extremely doubtful that uniform rules can be written to be fair and workable for all interested parties.

To deal with this concern, the Committee recommends that a "Committee on Administrative Procedures" be established to draft and submit procedural rules which will be made binding in agency proceedings. There is no requirement that these procedures must apply uniformly to all agencies. These rules will be consistent with any procedures established by statute. The rules should be designed to improve the fairness, quality, and efficiency of agency proceedings and to enhance opportunities for public participation in agency proceedings. They should clarify procedural rights and remedies available to parties and should permit non-specialists to practice more easily and effectively before federal agencies. The Committee is instructed to provide notice and an opportunity for public comment while considering any rules.

The rules will require majority approval of the Conference and a submission to Congress for review before they may be made binding on the agencies. This procedure is derived from the Rules Enabling Act governing congressional review of the Federal Rules of Criminal Procedure.

B. THE FAIRNESS AND EFFICIENCY OF ADMINISTRATIVE PROCEEDINGS

(11) Hybrid Informal Rulemaking

The Committee believes that agencies should engage in more than "notice and comment" procedures for the development of "major" rules which will have a significant impact on the economy and the public at large. Under present law, the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) ("APA") requires an agency to provide public notice of proposed rules and to invite comments on the proposal before adopting a rule. The agency must publish the proposed rule in the Federal Register, request written comments on the proposal, and publish a short explanatory statement together with the rule eventually adopted (5 U.S.C. § 553(b) and (c)). The legislative history of the APA indicates that these requirements were intended to be the "minimum basic essentials" of fair administrative procedures (Sen. Doc. No. 248, 79th Cong., 2d Sess. 193 (1946)).

Since the passage of the APA in 1946 and particularly in the last decade, the public has demanded a more active role in agency decision-making, particularly with respect to regulations which can be expected to have a wide impact on the economy or on the public health and welfare. In his testimony before the Committee, Harvard Law School Professor Richard Steward stated:

> As written, the APA does not require agencies to disclose facts of analysis upon which they rely in promulgating informal rules. This has severely frustrated efforts by environmental groups, consumer groups, regulated firms, and other concerned interests to ascertain and challenge the basis for an agency's proposal or decision. The courts have been similarly frustrated when called on to review the ultimate validity of the regulations. *Regulatory Reform Hearings* at 77.

In response to the deficiencies in the rulemaking requirements under § 553 of the APA, many agencies have developed a series of "hybrid" requirements which are designed to involve the public in a more meaningful way in rulemaking proceedings. Where an agency has failed to follow additional procedures, some courts have required it to do so. However, reliance on a case-by-case judicial process to evolve new rulemaking procedures has created an undesirable degree of confusion in the agencies as to the procedures which they should use to avoid reversal in the coutrs. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.* 435 U.S. 519 (1978).

This legislation is designed to update the APA to the realities of modern decision-making by expanding the opportunities for public participation in major rulemaking proceedings without burdening an agency with unnecessarily cumbersome and time-consuming procedural requirements. The section does not change the underlying philosophy behind informal rulemaking proceedings. The Committee agrees with Professor Kenneth Culp Davis, who stated in a letter to the Committee concerning the regulatory reform legislation, "The procedure of notice and written comments has been widely recognized as one of the greatest inventions of modern government. Since 1946, when that procedure was first required, the procedure, when used, has been overwhelmingly successful."

This section is divided into two main parts. First, it creates hybrid rulemaking procedures for "major" rules. Second, it establishes procedures for making publicly available the data, information and methodology upon which an agency substantially relies in "major" rulemaking proceedings.

Section 626(a) establishes hybrid rulemaking procedures for major rules. This section requires an agency engaged in the issuance of major rules to use such additional oral or written procedures as it determines are appropriate for "resolution of significant controversies over a material fact in dispute." In determining the appropriate procedures, the agency is required to consider the expected impact of the proposed major rule, the nature of the facts in dispute, the number and nature of the persons interested in commenting on the dispute, and the length of time available for development of the proposed rule.

The legislation clearly gives the agency the discretion to determine which additional procedures are appropriate to resolve significant factual controversies. It is the Committee's belief that the agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry which they determine are most appropriate to permit them to discharge their statutory duties. The section outlines several procedures which an agency may—but is not required to—employ. The procedures include advanced notice of proposed rulemaking, informal public hearings, meetings or conferences, the creation of expert advisory councils, mediation techniques, the presentation of staff arguments for written comment and rebuttal, and the presentation of witnesses for direct cross-examination or the opportunity for oral argument. The agency has the discretion to choose any of the above procedures.

Several agencies have expressed concern that this provision will increase the formality of rulemaking proceedings by prompting agencies, motivated by cautious general counsel, to use trial-type procedures to resolve all significant factual controversies. The Committee stresses that it is not the intent of this legislation to turn informal rulemaking into formal proceedings. The Committee believes that formal procedures, such as cross examination, are most often not appropriate to resolve complex factual and policy questions in rulemaking proceedings.

The role of the court in reviewing an agency's choice of procedures is carefully circumscribed. The courts are not permitted to entertain interlocutory appeals with respect to an agency's determination of appropriate procedures. In reviewing an agency's determination as to which oral or written procedures are "appropriate for resolution of significant controversies over a material fact in dispute," the court may invalidate the rule only if the determination involved a procedural error which "is so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the determination had not been made." This standard of review is derived from the Clean Air Act (42 U.S.C. § 7607(d)(8)).

Section 626(b) requires an agency to include in the notice of proposed rulemaking for a major rule a summary of the factual data and other information on which the proposed rule is based, a description of the methodology used in obtaining and evaluating this data or information, and an identification of the reports, documents, studies or other information from which this data or information was derived. If, during the course of a rulemaking proceeding, the agency plans to rely substantially on additional data or information, § 626(c) requires an agency to make that data or information—as well as the methodology and sources upon which such information is based—available in the regulatory file established under the new § 553(e) of Title 5, and to afford the public a sufficient time period to comment on this additional data or information. This section does not require an agency to re-open the public comment period every time it receives new information. The Committee recognizes that at some point in a rulemaking proceeding, an agency must "fish or cut bait" and proceed with the information in its possession. However, this section is intended to require the agencies to permit public comment on any new information upon which it intends to rely substantially.

This section is derived from *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375 (D.C. Cir. 1973), *cert. denied* 417 U.S. 921 (1974). In that case, the court remanded a rule of the Environmental Protection Agency partly because of that agency's failure to make public "in a timely fashion" the test results, methodology, procedures and scientific literature upon which the agency substantially relied in adopting the regulation.

This section does not affect the standard of judicial review of the intial and final regulatory analysis in § 629 of this title. The Committee believes that the courts do not have the expertise to evaluate the methodology, information or data upon which an agency relies in preparing a regulatory analysis. The contents of the regulatory analyses are expected to constitute part of the rulemaking record in connection with judicial review of the agency rule which is the subject of the analysis. Therefore, the adequacy or sufficiency of the data, methodology and studies underlying a regulatory assessment should form a basis for nullifying an agency action.

(12) *Ex Parte* Communications in Informal Rulemaking

This legislation directs agencies to devote greater attention to the subject of *ex parte* communications in informal rulemaking proceedings. The term"*ex parte* communication" is not used here to mean an off-the-record communication as defined in section 551(14) since there is no "record" in informal rulemaking proceedings. Rather it refers to the broad range of communications to agency decision-makers which occur outside the notice and comment proceedings. Section 202 of this legislation requires each agency to conduct notice and comment rulemakings under section 553 of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) ("APA") when it considers procedures for dealing with *ex parte* communications.

The issue of *ex parte* communications in informal rulemaking is extremely complex. Presently, the APA does not expressly prohibit such communications. When the APA was drafted in 1946, its authors made a careful decision to allow agencies great flexibility in obtaining expertise, data and information necessary to formulate a rule. In 1976, Congress amended the APA to prohibit *ex parte* communications in formal rulemaking proceedings and formal adjudications, and to require disclosure of prohibited contacts that might occur despite the ban (Government in the Sunshine Act, 5 U.S.C. § 557(d)). However, Congress did not expressly limit ex parte communications in informal rulemaking proceedings. In recent years, as federal regulations have had an increasing impact on the public, there has been a growing concern about agency decisions which are made on the basis of ex parte arguments offered by special interests which the public does not have the opportunity to rebut, and which the courts do not have the opportunity to consider upon judicial review of a rule. The Committee believes that fairness in administrative decision-making requires agency decision to be premised to the maximum extent possible, upon information available to interested parties. The Committee further believes that each regulatory agency can determine which ex parte procedures are best suited for its method of operation. Finally, the Committee recognizes that judicial review can only function where agencies have fully explained the basis for their decisions (*See SEC* v. *Chenery Corp.* (*I*), 318 U.S. 80 (1943).), and have made public all the significant factors relevant to their decisions *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971)).

This section requires agencies to consider procedures to make *ex parte* communications available to the public. It is derived in part from S. 1291. S. 1291 required an agency to log certain contacts—not only from persons outside the agency and the government, but also from officials who work elsewhere in the government. The Subcommittee on Administrative Practice and Procedure reported a similar proposal as § 553(a) of S. 2147. The principal change in the ex parte provision in S. 2147 is to limit controls on *ex parte* communications to contacts from persons outside the government.

The Committee has determined that at present the best approach is to encourage each agency to develop its own *ex parte* rules since a uniform rule might not be sufficiently responsive to the specialized needs of individual regulatory agencies. Therefore, the *ex parte* provision reported out of the Committee does not contain any uniformly applicable ex parte requirements.

In *Home Box Office* v. *FCC,* 567 F.2d 9 (D.C. Cir.), *cert. denied.* 434 U.S. 829 (1977), Judge J. Skelly Wright articulated a broad rule governing the permissibility of *ex parte* communications in informal rulemaking proceedings.

> Once a notice of proposed rulemaking has been issued, however, any agency official or employee who is or may reasonably be expected to be involved in the decisional process of the rulemaking proceeding, should 'refus[e] to discuss matters relating to the disposition of a [rulemaking proceeding] with any interested private party, or an attorney or agent for any such party, prior to the [agency's] decision * * *, ' . . . . If ex parte contacts nonetheless occur, we think that any written document or a summary of any oral communication must be placed in the public file established for each rulemaking docket immediately after the communication is received so that interested parties may comment thereon. . . . *Id.* at 57. (Citations omitted.)

The reaction to the *Home Box Office* case has been diverse. Several academics have criticized the opinion as destructive of the ability of agencies to obtain needed expertise during rulemaking proceedings. (*See* Nathanson, *Report to the Select Committee on Ex Parte Communications in Informal Rulemaking Proceedings*, 30 Ad. L. Rev. 377 (1978).) The Administrative Conference of the United States has urged the agencies not to refuse to hear *ex parte* arguments during informal rulemaking proceedings but has suggested public disclosure of such *ex parte* contacts. (Recommendation 77-3, Ex Parte Communications in Informal Rulemakings, 1 C.F.R. § 305.77-3 (1977).) While subsequent court cases have limited the *Home Box Office* doctrine (*see Action for Children's Television* v. *FCC*, 564 F.2d 458 (D.C. Cir. 1977); *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Counsel*, 435 U.S. 519 (1978)), other decisions (*see U.S. Lines* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978)) have relied on the case and the *Home Box Office* decision has not been directly overruled.

Home Box Office has prompted uncertainty at the agency level as to the appropriate procedures for dealing with *ex parte* communications in informal rulemaking. Several agencies have severely restricted ex parte communications while others have taken no action. The Division on Administrative Law and Agency Practice of the District of Columbia Bar (Division I), after conducting a survey of federal agency *ex parte* contact procedures, reported to the Committee that "a number of agencies have not adopted procedures or policies of any kind, and practitioners appearing before these agencies consequently have little or no idea of the standards which they are expected to observe." The Division also observed that several agencies with *ex parte* policies have articulated them in internal memoranda not generally available to the public during the development of their policies or afterwards. The Administrative Conference has also reported to the Committee that while numerous agencies have experimented with procedures to deal with *ex parte* communications, several major departments and agencies have not yet done so.

Perhaps the most difficult question concerning *ex parte* communications involves contacts among federal agencies and between the

Executive Office of the President and individual agencies concerning the merits of a rule. This subject was discussed in hearings on May 23 and 24, 1979, before the Environment and Public Works Subcommittee on Environmental Follution which received testimony concerning numerous contacts in late 1978 between the Executive Office economic staff and the Environmental Protection Agency on pending environmental regulations on ozone. This issue was also discussed in hearings conducted by this Committee.

The Committee believes that Congress has insufficient experience with the problem of inter-agency contacts to deal effectively with this controversy. There is reasonable concern that limits on inter-agency contacts might result in a "balkanization of the Executive Branch." Administration officials in the regulatory area contend that limits on interagency contacts will increase the difficulty of coordinating the nation's regulatory policies and activities. On the other hand, several groups, including the Natural Resources Defense Council, have argued that where agencies substantially rely on such contacts in formulating a rule, basic notions of openness and procedural fairness require the opportunity for public rebuttal of any evidence or arguments presented in an *ex parte* manner.

Several pending court cases address these complex issues. This legislation does not take a position on this controversy and is not intended to affect this litigation.

The Commtitee has concluded that the best approach to the *ex parte* communications problem is to allow each agency to experiment with its own procedures, both with respect to *ex parte* contacts from the public and from other agencies within the government.

The Committee agrees with the conclusion of Division I of the D.C. Bar:

> Legislation requiring each agency to develop regulations will ensure that the subject of ex parte contacts receives the careful attention it deserves, and that agencies develop consistent and clearly articulated policies to guide their own staffs and practitioners appearing before them. In addition, the experience of agencies in enacting and implementing regulations concerning ex parte contacts will provide the Congress, the courts, the public and the agencies themselves with a better understanding of the complex issues which this area involves. *Statement of Division I (Division on Administrative Law and Agency Practice) of the District of Columbia Bar on Section 202 of S. 1291* (April 28, 1980).

Since the permissibility of *ex parte* communications affects the right of the public to participate effectively in the formulation of agency rules, the Committee feels that the public should have the right to participate in the development of *ex parte* rules in the notice and comment proceedings required by Section 202. Thus, the current APA § 553(b)(A) exception for procedural rules should not apply to the proceedings undertaken to consider agency *ex parte* communications.

An agency's determination as to appropriate *ex parte* procedures is subject to judicial review under the arbitrary or capricious standard of § 706 of the APA.

The Committee hopes that agency experimentation with various approaches to the *ex parte* communications problem will result in a greater understanding of the appropriate balance between the agency's need for expertise, and the right of the public and the courts to understand fully the basis of an agency's action.

(13) REFORM OF ON-THE-RECORD PROCEEDINGS

The Committee recommends amending the procedures governing formal agency proceedings required by statute to be decided "on the record after opportunity for agency hearing" (5 U.S.C. § 554). These on-the-record proceedings include formal rulemaking, adjudication and licensing. The purpose of these amendments is to reduce unreasonable delay in agency decision-making and increase the ability of decision-makers to analyze the policy issues involved.

EXPEDITED HEARING PROCEDURE

Section 212 of the bill creates a new section 555 of the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*). This new general hearing process may be used by an agency, in its discretion, in any proceeding which predominantly concerns policy issues of a general character (including ratemaking, rulemaking and initial licensing proceedings) rather than specific factual questions.

The new expedited hearing would consist of a two-stage procedure. The first stage begins with written submissions or, when appropriate, with public legislative-type hearings. In the second stage, cross-examination would be permitted only on those factual issues where it is essential for fair and accurate decision-making. All the procedures mentioned in new section 555 are comparable to those which are used and proposed for use in modern non-jury proceedings in the federal district courts.

In no sense does the general hearing process involve a "stripped down" version of due process for the parties affected. When a decision involves policy judgments, rather than simple fact-finding to enforce a given policy of law, there simply is no need for the elaborate mechanics of current section 554 proceedings. Moreover, because the current adjudicatory format is often cumbersome, it can divert attention from the important questions of policy and analysis and can place an excessive burden on the agency and on the parties.

Creation of an expedited procedure is also suggested by the evolution of administrative law over the past three decades. The Administrative Procedure Act, adopted in 1946, divided administrative proceedings into basically two types: rulemaking (section 553 of the APA) and adjudications (section 554). This division had been previously developed by the U.S. Supreme Court in case law beginning at the turn of the century. *See, e.g., Morgan* v. *United States*, 298 U.S. 468 (1936); *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U.S. 287 (1920); *Prentis* v. *Atlantic Coast Line Co.*, 211 U.S. 210 (1908).

The policy distinction between these two types of proceedings was that rulemaking was essentially a "legislative" function and thus did not require a trial-type hearing. On the other hand, adjudications were basically "judicial" in nature and needed a full, adversary hearing. This distinction derived from case law prior to 1946 was modified slightly by the drafters of the APA in two respects. First, some types of rulemaking—so-called "formal" rulemaking—were governed by section 554 and thus were subject to a formal hearing. Also, section 554 was applied only to actions "required by statute to be determined on the record after opportunity for an agency hearing."

Over the past thirty years, courts have moved away from the idea that rulemaking requires one procedure and adjudication another. In addition to any specific statutory guidance, courts now look to the particular task that an agency is performing in a proceeding to determine what minimal procedures are required. 2 Davis, *Administrative Law*, §10.5 at pp. 324–25 (1979). Moreover, the concept of trial procedure itself has been broken down into a dozen or more constituent parts by the Supreme Court. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Some of these elements are: timely notice, confronting adverse witnesses, oral argument, oral presentation of witnesses, cross-examination of witnesses, disclosure of opposing evidence, an impartial decision-maker, a determination on the hearing record, and a statement of the reasons for the determination.

A general consensus has emerged among administrative law experts that the law has outgrown the simple APA statutory scheme. Some have argued that all of administrative procedure is, and should be, converging on a unitary procedure that would apply equally to matters traditionally designated as rulemaking and adjudication. P. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258 (1978). Indeed, some courts have been making informal rulemaking more formal and, at the same time, encouraging agencies to avoid use of full trial-type procedures contained in section 554 of the APA. *See, e.g., Home Box Office* v. *FCC*, 567 F. 2d 9 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); S. Wright, *Commentary: Rulemaking and Judicial Review*, Ad. L. Rev. 538 (Summer, 1978).

The Committee decision to adopt a stream-lined hearing procedure was also supported by evidence that the use of trial-type procedures has resulted in significant delays and needless cost. The Senate Governmental Affairs Committee conducted an exhaustive study of this matter concluding in a report published in 1977. Senate Committee on Governmental Affairs, 95th Cong., 1st Sess., *Study on Federal Regulations, Delay in the Regulatory Process* (Vol. IV) (1977), pp. 37–45 (hereinafter "Governmental Affairs Study").

This important study found that "undue delay" was the most frequently cited major problem of federal regulation by lawyers who regularly practice before such agencies. According to ACUS, agency proceedings average more than 19 months for licensing, 21 months for ratemaking, and over 3 years for enforcement actions. The report estimates that "undue regulatory delay results in economic costs of tens of millions of dollars" and that overly formal, trial-type agency procedures were among the principal causes. *Governmental Affairs Study*, Vol. IV, p. ix.

These conclusions were strongly supported by Dr. Donald Kennedy, Commissioner of the Food and Drug Administration (FDA), in testimony before the committee. On May 10, 1979, Dr. Kennedy made the following statement:

> Perhaps no feature of administrative law has generated more waste of the taxpayers' resources, more legal fees for private lawyers, or more delay in the administrative process

> than trial-type hearings in formal rulemaking. At FDA, we have learned from bitter experience to avoid such hearings like the plague. *Regulatory Reform Hearings* at 52.

The Committee noted that use of expedited procedures was not a completely novel idea. Both Congress and agencies have been experimenting with similar procedures.

In a number of recent statutes, Congress has authorized the use of flexible procedures where formal adjudicatory procedures probably would have been required in the past. Examples include the regulation of individual chemicals under section 6 of the Toxic Substances Control Act (15 U.S.C. § 2605); promulgation of source-specific air pollution control requirements under the Clean Air Act (42 U.S.C. § 7607); and remedial orders for violation of petroleum allocation rules (15 U.S.C. § 751).

Some agencies have moved in the same direction under their existing authorities. FDA has promulgated "summary judgment" regulations under which trial proceedings are only available for specific factual issues. See 41 Fed. Reg. 51,706 (1976). The Environmental Protection Agency has proposed the same approach for water pollution control permits making use of the special "initial licensing" provisions of the current Administrative Procedure Act. See 43 Fed. Reg. 37,078 (1978). The Civil Aeronautics Board has proposed similar procedures. The Committee bill would endorse and preserve this approach and would extend its scope.

The new expedited general hearing process has sufficient flexibility to permit agencies to adopt the techniques most appropriate to their particular jurisdiction. Thus, the bill permits an agency in its discretion to utilize the general hearing in any proceeding subject to section 554 which predomonately concerns policy issues of a general character.

The Committee determined that some agency proceedings should be exempt from the expedited hearing process on the basis of the testimony of several witnesses. Representatives of the American Bar Association, the Chamber of Commerce of the United States, Public Citizen's Congress Watch, and the Environmental Defense Fund expressed reservations about the expedited procedure. These misgivings concerned the possibility that the presiding employee could deny parties oral cross-examination of witnesses under section 555 in proceedings where these groups felt cross-examination was necessary.

Section 555(a)(1)(A) of the bill prohibits agencies from using the expedited procedure for proceedings to impose civil penalties for culpable violations of law. This is because such actions typically turn on factual disputes over responsibility for misconduct rather than on questions of policy. Thus, because of their accusatory nature involving allegations of culpable wrongdoing, a full trial-type proceeding conducted under section 556 is entirely appropriate. Examples of such cases are proceedings to recover penalties for violations of the Federal Mine Safety and Health Act (30 U.S.C. § 801) conducted under 30 U.S.C. § 820, unfair labor practice cases, and penalty proceedings under the Occupational Safety and Health Act (29 U.S.C. § 661).

Section 555(a)(1)(B) contains a further exemption from the expedited procedure for claims of any individual for a benefit. The major example in this category is Social Security claims. In fact, Social Security benefits decisions constitute the bulk (33 percent in fiscal

1975 according to the Administrative Conference of the United States) of all formal adjudications in the federal government. Special considerations of fairness, the predominance of questions of fact rather than policy, and the fact that most Social Security claimants are not represented by counsel argue for requiring a full trial-type hearing in such cases. This exemption was strongly supported by the National Legal Aid and Defender Association ("NLADA").

The Committee determined that on-the-record proceedings which are subject to an expedited hearing have certain fundamental characteristics which differentiate them from those proceedings exempted from this process. Essentially, section 555 applies to proceedings in which agencies use the adjudicatory format to make or apply policy when no one is accused of violating a law, and where there are no implications of culpable wrongdoing.

The Food and Drug Administration has recently experimented with a rule specifying that oral direct testimony and cross-examination shall be permitted only where other means are insufficient for a full and true disclosure of all relevant facts. The Interstate Commerce Commission and the Civil Aeronautics Board have similar provisions which have reportedly worked well.

The Committee was careful to ensure that the procedure in the bill avoided the difficulties that have arisen under the Magnuson-Moss Warranty-Federal Trade Commission Improvements Act (15 U.S.C. §§ 45 et seq.), which became law on January 4, 1975. Under that act and agency rules interpreting it, the FTC required the presiding judge to determine at the beginning of the proceeding which issues required a full hearing and cross-examination. This scheme did not work well and has been criticized by many who have studied the problem. *See, e.g.*, Governmental Affairs Study (Vol. IV) at 42; Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvements Act*, 44 Geo. Wash. L. Rev. 679 (1976).

The procedures in this bill avoid those difficulties by requiring a legislative-type hearing and written submissions prior to permitting a presiding employee to designate certain issues for full cross-examination. These earlier procedures should define the real issues of policy and fact sufficiently to enable the judge to make a reasoned decision on cross-examination. The Committee adopted procedures which more closely follow rules adopted by the EPA. 42 Fed. Reg. 20,640 (1977).

Although borderline cases do exist, most non-accusatory policy-dominated decisions are quite easily identified. There are three major classes of economic regulation which clearly fit this pattern: rate-setting, approval of financial transactions, and decisions on market entry or exit. These categories account for a large share of significant decisions by agencies reached after a trial-type proceeding. In some of these cases, agencies must choose among several alternatives based on incomplete and quickly obsolete factual data. They, of necessity, utilize projections, predictions and general policy choices prior to a final determination. In other cases, for example, some FERC rate-making cases, there are no factual disputes.

The Governmental Affairs study found that these non-accusatory proceedings would clearly benefit from an expedited hearing process. Other knowledgeable students of administrative procedure agree with the basic distinctions made in the bill. P. Verkuil, *The Emerging Concept of Administrative Procedure*, 78 Colum. L. Rev. 258 (1978); Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 Va. L. Rev. 991 (1978).

Much of the testimony critical of the expedited hearing process focused upon the likelihood that oral cross-examination of witnesses would not be permitted.

The Committee carefully considered these objections and is convinced that the bill provides for a fair and efficient method of determining whether cross-examination should be allowed in an expedited hearing. Subsections 555(b) and (c) provide that the expedited proceedings should begin with an informal "legislative" hearing. A formal hearing, with full cross-examination, would then be allowed if the presiding officer makes certain findings. First, he must determine that there is a genuine and substantial dispute of fact, including a dispute involving factual assumptions or methodology upon which expert opinion is based, which can only be resolved with sufficient accuracy by a formal hearing with cross-examination. The Committee expects that in exceptional circumstances, this may include a dispute as to the credibility of an expert witness significantly relied upon by one or more parties to the proceeding. Second, the presiding judge must find that the decision of the agency is likely to depend in whole or in part on the resolution of that dispute.

The Committee believes that the reliance on written material will tend to reduce the length of the oral hearing by eliminating the time that must be devoted to oral direct testimony or to cross-examination. In addition, if oral cross-examination is eventually held, it will be better organized and more precise because the parties will have had time to study the direct testimony. Since scheduling problems often cause delays in completing oral trials, greater reliance on written testimony also avoids instances where a proceeding is delayed because the presiding employee, all the attorneys, and the witnesses must be assembled for an oral hearing. At the Interstate Commerce Commission, for example, a case scheduled for an oral hearing must wait an average of 207 days before it is heard. A proceeding conducted solely in written form is subject to about half as long a wait.

SEPARATION OF FUNCTIONS

The bill modifies provisions in section 554 of title 5 which describe the extent to which agency decision-makers in formal proceedings may consult other persons within the agency about the substance of the proceeding. Such provisions are usually called separation of functions rules. Currently, the Administrative Procedure Act (5 U.S.C. § 551 *et seq.*) prohibits the involvement of investigators or prosecutors in the agency's decision-making process. An exception is made, however, for proceedings involving formal rulemakings, agency members, or initial licensings. The bill deletes this exception and extends this limitation to most proceedings subject to section 554 or 555 of the Administrative Procedure Act.

However, the bill provides that agency decision-makers (or their advisors) in rulemaking and initial licensing proceedings may consult other agency personnel (not actively engaged in investigating or litigating functions) for assistance in evaluating the record and understanding the issues in the case before them.

Finally, the bill clarifies the category of persons which the current law describes as those "engaged in investigative or prosecutive functions". In particular, the word "prosecutive" is changed to the word "litigating." This is designed to ensure that there will be no secret conversations between agency decision-makers and other litigating for the agency which may unfairly undermine the effect of evidence formally placed in the record.

The Committee believes that the bill strikes a reasonable balance among the competing policy considerations underlying separation of functions rules without extensive changes in those rules. On the one hand, the bill applies separation of functions provisions to those who actively engage in the presentation of a case on behalf of the agency. This job can only be done well by people who take an adversarial position toward the issues, an attitude that acts as a "psychological disqualification" against informally advising in subsequent agency deliberations.[34]

On the other hand, the Committee believes that it is important that agency decision-makers not be barred from talking to knowledgeable agency personnel about a matter as long as that employee is not Agencies make their policy decisions through a division of staff labor that allows different experts to work on different pieces of a decision. This division of labor leads to a better final product as the result of teamwork and is one of the major reasons for having administrative agencies in the first place. *See* 2 Davis, *Administrative Law*, § 11.10 at p. 87 (1958). Therefore, artificial barriers between members of an agency should be eliminated except where there are compelling public policy reasons.

Particularly when making decisions in cases subject to an expedited procedure—for example, in ratesetting, approval of financial transactions, and decisions on market entry or exit—agencies must decide, often on the basis of complex technical materials, which of the many alternatives best implements broad statutory goals. For example, they may make decisions in complicated fields, such as licensing power plants, permits to discharge substances into water and removal of pesticides from the market. Clearly, in such cases, agencies must be free to draw flexibly on the expert knowledge of any staff member (not on the trail staff) to analyze the record. To hinder that consultative process is to weaken one of the great strengths of the administrative process. *See* Pedersen, *The Decline of Separation of Functions in Regulatory Agencies*, 64 Va. L. Rev. 991 (1978).

OTHER REFORMS

Other provisions in the bill are designed to enhance agency efficiency throughout the administrative process. The bill authorizes the establishment of boards, composed of one or more agency commissioners, to review the decisions of administrative law judges. This provision will relieve multi-member commissions of the responsibility for reviewing *en banc* every one of these decisions. Similarly, it authorizes the agency to delegate to the administrative law judge the authority to make the final decision in a case. The bill encourages the administrative law judge in this and other ways to take a more active role in controlling the nature and length of the hearings before him. All these provisions will reduce the backlog and delays that now occur as proceedings wait their turn to be reviewed by the agency heads.

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[34] Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941) at 56.

Even more important, these changes will permit agency heads to concentrate on general policy issues and the general direction and effectiveness of the agency's regulatory programs. At the same time, the changes will enhance the authority and prestige of the administrative law judge, and thereby increase his ability to conduct as fair and efficient a hearing as possible.

C. THE ROLE OF THE COURTS AND OF ADMINISTRATIVE LAW JUDGES IN THE REGULATORY PROCESS

(14) Standard of Judicial Review

The Committee adopted an amendment which is designed to provide stricter judicial review of agency rules. The amendment, appearing in Section 216 of this legislation, was proposed by Senator Dennis DeConcini and Senator Alan Simpson.

Section 216 is derived from legislation (S. 111), introduced by Senator Dale Bumpers of Arkansas, and approved by the Senate on September 7, 1979, as an amendment to S. 1477, the "Federal Courts Improvement Act" (96th Cong., 1st Sess. (1979)). This amendment to S. 1477 revised Section 706 of the APA which defines the scope of judicial review of federal administrative agency action. It eliminated the "presumption of validity" which some courts traditionally afford agency rules and provided that courts should not uphold a challenged rule unless the agency can establish its validity by a "preponderance of the evidence."

Since that time, this provision has been revised substantially. The amendment, adopted by the Committee, is the product of that revision.

Section 216 modifies the scope of judicial review of federal agency actions in three main ways. The section instructs courts to review agency actions without according agency rules a "presumption of validity." Further, courts must set aside agency actions unsupported by "substantial evidence" in the case of factual determinations in proceedings subject to §§ 553 or 554 of the APA or otherwise reviewed on the record of an agency hearing provided by statute. Finally, reviewing courts must determine that an agency's statutory jurisdiction has been granted "expressly," or by "clear implication," in light of the statute and other relevant legal materials.

The Presumption of Validity.—Section 216 provides that a reviewing court shall make determinations "without according any presumption of validity" to any rule, except where the rule is raised as a defense to a criminal or civil action. The intent of this section is to encourage courts to give agency actions a thorough, probing review. Senator Bumpers stated that a main goal of the provision was to reverse the "traditional presumption that agency regulations are valid." See 125 Cong. Rec. S. 12145 (Daily ed., Sept. 7, 1979).

The term "presumption of validity" is a shorthand reference to the tendency of some federal courts to defer to an agency's expertise when reviewing the validity of a rule. Sometimes courts rely on this "presumption of validity" in reviewing questions of fact, sometimes when reviewing questions of law. Like all shorthand expressions, it does not capture the nuances of the body of law and of judicial practices which has developed over the last century to govern judicial review of agency actions. Nonetheless, it depicts the doctrine (alternatively referred to as the "presumption of regularity") which some courts articulate to justify a less than thorough judicial scrutiny of agency actions.

To the Committee's knowledge, the Supreme Court has never itself used the term "presumption of validity" as such when reviewing the *legal* basis for an agency's rules. Forty years ago, it employed a presumption favoring an agency in reviewing the *factual* basis for agency action. In *Pacific States Box and Basket Co.* v. *White*, 296 U.S. 176 (1935), the Supreme Court was presented with a challenge to regulations promulgated by the Oregon Department of Agriculture. Justice Brandeis, writing for the majority, held that when agency action is challenged, then "if any state of facts reasonably can be conceived that would sustain it, there is a presumption of the existence of that state of facts, and one who assails (the rule) . . . must carry the burden of showing . . . that the action is arbitrary." *Id.* at 195. The Court, however, continued to assert that it has the responsibility to decree the limits of an agency's statutory power. *See Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1945).

In the past numerous judicial opinions have used the presumption of validity as a talisman when reviewing the validity of agency regulations. *See generally* Woodward & Levin, "In Defense of Deference: Judicial Review of Agency Action", 31 Ad. L. Rev. 329, 331–335, (1979). In recent years, however, many courts seem to be in the process of shifting from the view that agency regulations are presumptively valid. (*See* letter of Professor Clark Byse to Mr. Francis M. Gregory, Jr., Esq., published in the Congressional Record, S. 411, January 23, 1979). In the Supreme Court case, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971) the Court stressed that although the Secretary of Transportation's decision deserved a "presumption of regularity", that presumption did "not . . . shield his action from a thorough, probing, in-depth review." *Id.* at 415.

Some courts continue to speak of the "considerable deference" owed to the interpretation of a statute "by the officer charged with its administration" and of the presumptive validity that attaches to agency rules. (*See, e.g., Ethyl Corp.* v. *EPA*, 541 F. 2d 1, 31, n. 64, 34 (D.C. Cir., 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976).) However, as Judge Carl McGowan points out: "Even if reviewing courts do indeed defer to the agencies answers to certain questions reflecting various shades of law and fact, a closer look shows that they are also at great pains to establish principled boundaries to agency discretion by reference to the type of decision under review and the nature of the agency's statutory authority. Simply stated, courts defer in some situations, and not in others . . . " See Carl McGowan, "Congress, Court and Control of Delegated Power", 77 Columbia L. Rev. 1119–1166 (1977). The extent to which courts defer to an agency's expertise and experience depends on many factors. First it depends on the importance of the question at issue. Courts are more likely to defer to an agency on minor questions of statutory interpretation (for example, whether a newsboy is an employee, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944)) than on major questions of statutory construction or on questions of constitutional law. Moreover, courts will give different degrees of weight to an agency's views depending on the agency's reputation as an expert in a particular area and on the extent to which Congress has delegated the administration of a statutory scheme to the agency. *See* L. Jaffe, *Judicial Control of Administrative Action* pp. 546–594 (1965).

This provision, is, therefore, consistent with the present trend in the courts to give agency rules a closer, harder look, but also to defer to an agency's expertise and experience where appropriate. *See* S. Breyer and R. Stewart, *Administrative Law and Regulatory Policy,* pp. 291–293, (1979). It does not affect the provision in § 706(2)(A) of the APA that requires courts to invalidate agency rules when they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Committee believes strongly that courts should continue to give appropriate weight to the specialized experience and expertise developed by the agencies because of their familiarity with the underlying statutes and their immersion in day-to-day administrative operations that reveal practical consequences of alternative courses of action.

The Committee disagrees with the opponents of the DeConcini-Simpson amendment who argue that this section would undermine the value of agencies as specialized, expert decision-making bodies. On the contrary, in this complex, technological society, the Committee recognizes the critical need for the expertise developed by regulatory agencies. This section is not designed to shift policy decisions to the courts, but merely to require courts to take a "hard look" at agency actions to determine whether agencies have acted arbitrarily or capriciously

The Committee reaffirms the principles articulated in the Attorney General's report on administrative procedure, which was prepared under the direction of Attorney General Robert Jackson nearly forty years ago and which formed the philosophical foundation for the Administrative Procedure Act:

> [W]e expect judicial review to check, not to supplant administrative action. Review must not be so extensive as to destory the values—administrative expertness, specialization, and the like—which . . . were sought in the establishment of administrative agencies.[35]

This Committee believes that this section will allow courts to "check", but not "supplant", administrative action.

The substantial evidence standard.—Section 216(c) amends the APA by requiring courts to hold unlawful and set aside factual determinations, including inferences or projections, made by an agency in informal rulemaking proceedings which are "unsupported by substantial evidence." Under the APA, the term "substantial evidence" currently applies only to the review of formal "on-the-record" adjudication and rulemaking which usually involves trial-type hearings (5

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[35] *Administrative Procedure in Government Agencies*, Report of the Committee on Administrative Procedure Appointed by the Attorney General, S. Doc. No. 8, 77th Cong., 1st Sess. 77 (1941).

U.S.C. §§ 556, 557, 706(2)(E)). However, in many cases, Congress has borrowed this formulation to define the standard of judicial review of rules promulgated by an agency through informal or hybrid rulemaking procedures, despite the absence of any requirement that the agency hold formal hearings.[36]

This legislation would apply the substantial evidence standard to the review of agency factual determinations, including projections and inferences, in informal rulemaking proceedings. In commenting on the substance of the DeConcini-Simpson amendment, Mr. Alan A. Parker, the Assistant Attorney General in charge of the Office of Legislative Affairs, pointed out the difficulties in requiring a substantial evidence standard in a May 14, 1980 letter to the Honorable Peter W. Rodino, Jr., Chairman of the House Committee on the Judiciary:

> [M]any, if not most, of the crucial determinations pertinent to informal rulemaking are of a general policy nature, and do not turn on the existence or non-existence of specific 'facts' so much as they turn on the evaluation of probabilities, the balancing of objectives and the selection of methods to achieve given ends within statutory limits. It would be erroneous to assume that such decisions can be easily assimilated into a model of review designed especially for factual questions aired and tested in "on the record" proceedings. One could expect considerable confusion about the way in which any "substantial evidence" standard should apply with respect to such issues in informal rulemaking.

The Committee agrees that informal rulemaking proceedings do not easily lend themselves to a requirement that an agency establish its facts, inferences, and projections by substantial evidence. Section 553 does not require an agency to make specific findings of fact or to set forth the "inferences or projections" which form the basis of the rule. Section 626 of this legislation requires agencies to summarize the significant facts upon which a proposed major rule is based. However, there is no requirement that the agency summarize the facts upon which it relied when it publishes the final rule. Nonetheless, it is the Committee's belief that inherent concepts of administrative fairness require an agency to spell out in the "concise general statement" of the rule's "basis and purpose" the significant facts, upon which the agency substantially relied in formulating the final rule (§ 553(c)). The substantial evidence requirement would apply to these facts.

This section is clearly not intended to require agencies to prove by substantial evidence every fact, inference or projection which was presented to it or upon which it indirectly relied. Such a requirement is impracticable and would greatly hinder the ability of agencies to achieve their statutory mandates. This is particularly true since rulemaking proceedings can take many years and involve thousands of pages of transcripts, studies and data. Furthermore, this section is not designed to turn informal rulemaking into formal rulemaking; nor is the regulatory file established in § 553(e) of this title intended to serve as an agency "record" in the formal sense of the word.

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[36] *See, e.g.*, Occupational Health and Safety Act of 1970, 29 U.S.C. § 655(f) (1976); Consumer Product Safety Act, 15 U.S.C. § 2030(e) (1976); Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(e)(3)(A) (1976); Toxic Substances Control Act, 15 U.S.C. § 2618(c) et seq (1976); Natural Gas Act, 15 U.S.C. § 717r(b); Federal Power Act, 16 U.S.C. 825L(b) (1976), as amenedd by the Department of Energy Organization Act, 42 U.S.C. § 7151 (1979); Securities Acts Amendments of 1975, 15 U.S.C. § 78y(b)(4) (1976); Powerplant and Industrial Fuel Use Act of 1978, 42 U.S.C. 8412(c) (1979).

"Express" or "clear" authority for agency action.—Section 216(d) provides that whenever agency action is challenged as not authorized by statute, the reviewing court must determine that the agency's statutory jurisdiction or authority has been granted expressly or, in light of the statute and other relevant legal materials, by clear implication.

This section clarifies the obligation of the courts to set aside agency action found to be in excess of statutory jurisdiction authority or limitations or short of statutory rights. See 5 U.S.C. § 706(2)(C). The need for such an independent check on an agency's assertion of its own authority or jurisdiction has long been a mainstay of administrative law. *See Crowell* v. *Benson*, 285 U.S. 22 (1932); *Kent* v. *Dulles*, 357 U.S. 116 (1958); and *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976). As Congress continues to delegate broad grants of authority to agencies, the Committee believes that there is an increasing need for vigilant scrutiny of the limits of that authority. The problem was stated succinctly by the Court of Appeals for the District of Columbia Circuit in *Lubrizol Corp.* v. *EPA*, 562 F.2d 807 (D.C. Cir. 1977):

> In a period of seemingly growing popular conviction that government agencies too often transgress the statutorily imposed boundaries of their authority, courts, in reviewing administrative action, must be alert to confine that action within those boundaries. . . . EPA remains free to present to *Congress* its arguably persuasive case for an amendment. . . . But for *this Court* to countenance what, on the record before us, is essentially an amendment by regulation would constitute an unwarranted judicial intrusion upon the legislative sphere wholly at odds with the democratic processes of lawmaking contemplated by the Constitution. 562 F.2d at 819, 820. (Footnotes omitted.)

This section is not intended to prevent the courts from using the tools of statutory construction in reviewing agency actions that have evolved as the necessary concomitants of broadly worded delegations to agencies. Even if a statute does not explicitly anticipate a particular problem that arises in its implementation and even if the legislative history is silent on the particular point in issue, a court should uphold an agency action if it is authorized by "clear implication" of the statutory language or the Congressional intent as illustrated by relevent legal materials. *See, e.g., Whirlpool Corp.* v. *Marshall*, 100 S. Ct. 883 (1980).

(15) VENUE

This legislation improves venue laws by encouraging courts to consider local impact when determining whether to transfer a case to another jurisdiction. Section 218 accomplishes this goal in three ways.

First, it provides that whenever an action arguably of a local environmental nature is brought in the United States District Court for the District of Columbia, the plaintiff must forward a copy of his complaint to the attorneys general of up to five states affected by the suit. The objective of this provision is to ensure that states which are affected by an environmental action will have adequate and timely notice that the case has been brought in another judicial district.

Second, the section encourages a court to consider local impact when deciding motions to transfer under 28 U.S.C. § 1404(a) and 28 U.S.C. §2112(a). Section 218(b) of the legislation amends 28 U.S.C. §1404 by specifying that a district court can consider whether an action has a "primarily local or regional impact" when it is determining whether to transfer a civil action to any other district "for the convenience of parties and witnesses and in the interest of justice". Section 218(c) similarly amends 28 U.S.C. §2112(a) which relates to the transfer of cases in the federal appellate courts. These provisions codify existing law which allows a court to consider local impact as a factor in deciding a transfer motion. *See e.g., National Preservation Law Center* v. *Landrieu,* (D.D.C. Civil Action 80-0514, April 1, 1980) (NEPA case transferred to South Carolina because, among other things, the project under review was located in the other forum); *National Wildlife Federation* v. *Andrus,* Civil Action No. 78-2090 (D.D.C. 1979) (case transferred to State of Washington); *National Wildlife Federation* v. *Alexander,* 458 F. Supp. 29 (D.D.C. 1978) (case transferred to South Carolina where the port terminal in dispute was located).

Third, it provides guidance to the federal district courts with respect to the transfer of local environmental cases where the United States is the defendant. Section 218(b)(2) creates a presumption that courts must transfer a local environmental case to another judicial district when the action primarily affects local or regional interests in that district unless there is a substantial hardship or injustice, or the impact of the action is substantially national rather than local in effect or scope.

None of these provisions in Section 218 affects in any way specific statutes governing venue.

Section 218 marks the second time in twenty years that this Committee has acted to broaden venue laws in actions against the federal government. Prior to 1962, these actions were restricted to the United States District Court for the District of Columbia because, in part, of the doctrine of "indispensable parties" which limited such actions to Washington, home of the "indispensable" agency head or other government official. See Comm. on the Judiciary, S. Rept. No. 1992, 87th Cong., 2d Sess. (1962), reprinted in U.S. Code, Cong. & Ad. News 2784, at 2786. In the 87th Congress, the Mandamus and Venue Act of 1962 (28 U.S.C. § 1391, Public Law 87-748) was enacted to make "it possible to bring actions against Government officials and agencies in the United States District Courts outside the District of Columbia." *Id.* at 2785.

This 1962 act broadened venue in such actions to include not only location where a defendant in the action resides, but also, except when a statute calls for specific venue, locations where "the cause of action arose," where "any real property involved in the action is situated" or if "no real property is involved in the action, where the plaintiff resides." *Id.* at 2787. The 1962 Mandamus and Venue Act has been broadly construed to favor the plaintiff's choice of forum. *See Reuben H. Donnelly* v. *Federal Trade Commission*, 580 F. 2d 264 (7th Cir. 1978); *Dow Chemical, U.S.A.* v. *Consumer Product Safety Commission*, 459 F. Supp. 378 (W. D. La. 1968).

Section 218 is derived in large part from legislation introduced this Congress to increase the consideration by courts of local impact when deciding where cases should be tried. S. 739, introduced by Senator Laxalt, would have required that certain civil actions orginate in a judicial district where a substantial portion of the impact or injury occurred. S. 1472 took a somewhat similar approach but focused primarily on environmental actions. Hearings were held before the Subcommittee on Improvements in Judiciary Machinery. *See* Senate Judiciary Subcomm. on Improvements in Judicial Machinery, *Hearings on Federal Venue Statutes*, 96th Cong., 2d Sess. (1980)

At the hearings, James Moorman, testifying for the Department of Justice, suggested that these legislative proposals might be too "sweeping" and suggested "a combination of a new notice requirement and an amendment to the transfer section to establish a presumption in favor of transferring cases in which the impact is primarily local." On May 2, 1980, the Subcommittee favorably reported an original bill reflecting, in part, the Department of Justice's recommendation, and maintaining the traditional right of the plaintiff to choose a forum in an action against the United States.

The Committee undertook consideration of this original Subcommittee bill as an amendment to this legislation. In Committee, one major amendment was added to the Subcommittee bill providing that a local environmental case should not be transferred if the action is "substantially national rather than local in effect or scope." This amendment was consistent with language originally in S. 1472, and would cover environmental actions which affect several states or several properties in multiple judicial districts. Examples include cases involving long-range transport of pollutants across state boundaries (i.e., the acid rain litigation), actions which affect the environment in other countries, and regulations affecting several states to name a few. By contrast where a case affects a single plant, a single recreational site, or a decidedly local situation outside the judicial district where the case was filed, and the case lacks national implications, the case should be transferred. For example, *Defenders of Wildlife* v. *Andrus*, cited above, and *Pyramid Lake Paiute Tribe Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973) were cases which were brought in the District of Columbia and which could be described as "primarily local or regional" in impact.

(16) ADMINISTRATIVE LAW JUDGES

This legislation alters the system for recruiting and examining administrative law judges (ALJ's). First it transfers management of ALJ's from the Office of Personnel Management to the office of the chairman of ACUS. Second, it expands the list of eligible ALJ's from three candidates to ten. Third, it eliminates the veterans preference for ALJ applicants. Finally, it creates a task force to study ALJ independence and to examine the feasibility of establishing an independent corps of ALJ's to replace the present system in whole or part.

The position of administrative law judge was formally created by the APA in 1946. Prior to that time, the use of individual agency employees for factfinding and decision-making was authorized only for the Interstate Commerce Commission. By design, the ALJ positions created by the Administrative Procedure Act were a substantial improvement on the Interstate Commerce Commission model.

Under the Administrative Procedure Act, ALJs were placed in charge of administrative adjudication, and were independent from the agencies they served. The theory behind this decision was that ALJs should be protected from the threat of agency retaliation for their decisions in order to preserve ALJ objectivity. ALJ management was kept to a minimum and was placed, along with the task of ALJ recruitment, outside the agencies and in the Civil Service Commission (now the Office of Personnel Management). ALJs are chosen on the basis of merit after systematic testing and evaluation. Their tenure is determined by persons outside the agencies. There is no probation period for new ALJs and they are removed only for cause after a hearing on the record or upon a reduction in force. Agencies are not, at any time, permitted to appraise ALJ performance.

CURRENT ORGANIZATION

ALJs have extensive control over administrative proceedings. Their functions include issuing subpoenas, disposing of procedural requests, questioning witnesses, determining witness credibility and making findings of fact and conclusions of law, and recommending decisions or making initial decisions on the basis of the evidence on the record.

In 1947, there were 196 ALJs in fifteen agencies. Today, there are approximately 1,070 ALJs in 29 agencies. Among other matters, ALJs handle licensings, ratemakings, and benefit claims.

Candidates for ALJ positions must submit to a lengthy ranking and testing process. Evaluation of potential ALJs is a combined effort. The Office of Administrative Law Judges in the Office of Personnel Management conducts the actual testing and evaluation. The federal administrative agencies help in recruiting, participate in the oral interview and have the final selection decision. The private bar supplies a representative for the oral interview panel, typically from the Administrative Law Section of the American Bar Association.

Out of a given candidate pool, 32 percent of candidates fails to meet the threshold qualification requirements and another 36 percent fails to receive the combined experience and rating level necessary to qualify for the writing examination during which candidates must compose sample opinions. Another four percent fails to get past the written examination and oral interview which follows. Only 20 to 30 percent of the candidate pool survives the weeding process and less than one-half of the survivors are ever appointed as ALJs.

When a federal administrative agency perceives a need to hire a new ALJ, the agency contacts the Office of Personnel Management which supplies a list of the three highest-ranked ALJ candidates (on the basis of scores). This forwarding of the top three names is called the "rule of three". Except in certain circumstances, the agency must select one of those three candidates for ALJ appointment.

The Senate Governmental Affairs study concluded that administrative law judges "hold the key to reducing delay in much of the adjudicatory process" and that the ALJ selection process should be fundamentally revamped—that responsibility for the ALJ program be centralized and evaluation of ALJs be provided for. Senate Comm. on Governmental Affairs, *Study on Federal Regulation; Delay in the*

Regulatory Process, Volume IV, 95th Cong., 1st Sess. (Comm. Print 1977) at xi.

LEGISLATIVE PROPOSALS

All of the changes in the ALJ program recommended by the Governmental Affairs Committee were included in either S. 262 or S. 755. The most controversial of the proposed changes was the "term of years" provision which created a limited term of years for ALJ appointments. S. 262 established a ten year term; S. 755 established a seven year term. At the end of the term, each ALJ would be evaluated by a performance and qualification review board, the majority of the members of which would be ALJs to determine whether the ALJ was affirmatively qualified to be appointed to an additional ten -or seven-year term. S. 755 would provide for pay performance awards for ALJ's based n the findings of the performance and qualification review board. The final reappointment decision would be made by the Chairman of ACUS and could not be appealed to the Merit Systems Protection Board or to any court.

Both S. 262 and S. 755 would change the "rule of three." S. 262 would have a list of the ten highest-ranked ALJ candidates forwarded to agencies for their consideration in selecting new ALJ's. S. 755 would have a list of "no less than five" candidates forwarded for agency consideration.

S. 755 would place the Chairman of ACUS, rather than the Office or Personnel Management as is now the case, in the position of managing the ALJ program. The ACUS Chairman would disseminate information about ALJ positions, recruit likely candidates, develop ALJ qualification standards in consultation with the Office of Personnel Management and conduct ALJ testing. Both S. 262 and S. 755, as introduced, would give the Chairman of ACUS the authority to file complaints with the Merit Systems Protection Board against ALJs, based on perceived unacceptable performance by that ALJ. Such complaints would be filed only after an evaluation other than the regular review by a performance and qualification review board. ALJs removed under this section would be entitled to civil service positions. Under S. 755, the Chairman of ACUS would select ALJs to be temporarily reassigned from one agency to another agency which might be understaffed. S. 262 would permit the Chairman to make recommendations in this regard.

S. 755 would create an Administrative Law Judge Career Service which would be separate from the Senior Executive Service and distinct from the competitive service. Finally, under S. 755 and S. 262, ALJ applicants who are veterans would no longer receive special treatment in the selection process.

CONCERN ABOUT THE TERM OF YEARS

Those opposing the term of years and periodic evaluation proposals cited numerous bases for their positions. The major concern was that the existence of an evaluation system would make it impossible for ALJs to retain their objectivity or an appearance of objectivity. Particularly toward the end of a term, an ALJ would flinch from findings or initial decisions which might tend to antagonize agency attorneys. The fear of discipline would inevitably mix into decisionmaking. To those outside the agencies, ALJs would lose the appearance of independence which is so vital to the legitimacy of agency proceedings.

The decisions ALJs make are critical ones and agencies sometimes apply pressure on ALJ's to influence the outcome of their decisions. Several witnesses cited occasions in the past when efforts were made to reprimand or to fire hearing examiners whose decisions were unpopular. A commonly cited example of this was an effort in 1948 to fire almost one-half of the ALJs at the National Labor Relations Board because their decisions were not considered to demonstrate "correct political philosophy".

Also, opponents of the limited term cite the security of ALJ positions as a major attraction for those coming to the job from outside the government. They fear that under a limited term system it would become increasingly difficult to attract high quality candidates from outside the agencies.

Finally, many witnesses expressed concern that the proposal is based on the premise that significant numbers of ALJs are failing to perform well when, in fact, that is not the case. Due to the extensive testing system, it is argued, ALJ quality is uniformly high.

Because of these arguments the Committee recommends that the term of years, periodic evaluation and pay performance award proposals not be adopted, and that the ALJ program should be directed toward attracting more candidates from outside the agencies. However, the Committee notes that there may be ways to isolate the term of years review from political pressure and thereby eliminate the major objections to the term of years.

The Committee also recommends centralization of the management of an ALJ Career Service in the Office of the Chairman of ACUS. The legislation requires the Chairman (in consultation with OPM when appropriate) to handle dissemination of information on ALJ positions and recruiting of ALJ candidates, establish qualification requirements, certify the roster of persons eligible for the ALJ position, monitor and revise the maximum number of ALJs holding General Schedule positions of Grades 16, 17 and 18, and reassign ALJs as is necessary.

The Committee acknowledges the need for ALJ autonomy and independence but concludes that some management of the program is necessary and would work to the advantage of the ALJ's. The General Accounting Office, after studying the ALJ program in 1978 and again in 1979, concluded that OPM, the only office clearly responsible for ALJ management, takes a "hands off" approach toward the corps. As a result, expanded needs for ALJs cannot be anticipated, work distribution problems in agencies do not come to light and are not solved, unsatisfactory performers are not identified for counseling or removal, and the effectiveness of the selection process is never assessed. Moreover, OPM management has been technical in nature, and not substantive.

This management gap is not filled by chief ALJs. There are only eleven chief ALJs and their abilities and inclinations toward management vary. Focusing responsibility for the technical and policy management of the ALJ program clearly and exclusively in one office, that of the Chairman of ACUS, will set the stage for identification and correction of a number of the problems that drain ALJ efficiency and prestige. Careful consultation with the Office of Personnel Management will ensure that the experience of those in that office is integrated smoothly into the new ACUS role.

The Committee also favors the "rule of ten" and elimination of the application of the veterans preference to ALJ selection as provided in S. 755 and S. 262. The rule of ten—certifying ten names from which ALJs can be chosen to agencies rather than three names as is now the case—has been challenged as contrary to the practice and policy of merit selection. The Committee rejects that argument. Those who oppose expansion of the list seem to have decided to ignore the fact that positions on the list have already been rearranged to accommodate the veterans preference and expressions of geographic preference made by the ALJ candidates. The list is not exclusively dependent on merit as many would maintain. Expanding the list to ten will not result in any decline in ALJ quality.

An excellent reason exists for adopting simultaneously the proposal to expand the list and eliminate the application of the veterans preference. Of 1,070 ALJs, only 35 are white females, 19 black males, two black females, three native Americans, 22 Spanish-surnames and six Asian. The Committee also perceives that agency interest in hiring a minority ALJ can have little impact if that agency must wait until a minority is among a list of only three prospective ALJs. The Committee concludes that a change to a rule of ten and elimination of the application of the veterans preference would increase opportunities for women and minorities to become members of the ALJ program without any sacrifice of ALJ quality.

The Committee recommends that a task force be established to study the independence of the ALJ system and report to the Congress on the feasibility of establishing an independent corps of ALJs to replace the present system in whole or part. This task force was proposed by Senator Howell Heflin. The possibility of an independent corps of ALJs has been recommended, at various times, by the Federal Administrative Law Judges Conference, the ABA Conference on Administrative Law Judges and former ABA president Bernard Segal. Conversion to a system of an independent corps of judges would involve separate housing of ALJs apart from the regulatory agencies, removal of ALJs from the General Schedule pay scale, uniform procedural rules for presentations before ALJs and or limited review of ALJ decisions. Because some experts have recommended against the creation of an independent corps of judges and because all independent corps recommendations differ in scope and structure, the Committee perceives that a task force study of this question is warranted.

IV. Section-by-Section Analysis

TITLE I—THE MANAGEMENT, PLANNING, AND ANALYSIS OF REGULATORY FUNCTIONS

Section 101. Findings and Purposes

Section 101 establishes the findings and purposes of this bill.

Section 102. Improving the Regulatory Process

Section 102 establishes a new chapter 6 in title 5 of the United States Code. Chapter 6 would have the following new provisions:

SUBCHAPTER I—DEFINITIONS; REGULATORY POLICY BOARD

Section 601. Definitions

Section 601(1) defines an agency by referring to the definition in Section 551(1) of title 5 of the United States Code. Both executive and independent agencies are considered "agencies" under this definition.

Section 601(2) defines "agency action" as the whole or part of an agency rule, order, license, sanction, relief or the equivalent or denial thereof, or failure to act, as provided in Section 551(13), title 5, United States Code.

Section 601(3) defines "rule" as the same as in Section 551(4), title 5, United States Code, except that the definition does not include rules issued relating to matters in which the following are involved: (a) military or foreign affairs functions of the United States, (b) matters relating to agency management, organization, personnel or rules of agency practice or procedure, (c) rules relating to the acquisition by the federal government by contract of real or personal property or services through purchase, lease or barter which are promulgated in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy or rules relating to disposal by contract of sale of surplus and personal property of the United States, which are promulgated in compliance with criteria and procedures established by the Administrator of General Services, or rules relating to public property or contracts of a wholly owned government corporation (d) interpretative rules, (e) general statements of policy, and (f) rules of particular applicability relating to, *inter alia*, rates, wages, corporate or financial structures or prices.

Section 601(4) provides the definition of a major rule for the purpose of conducting a regulatory analysis and other functions under this chapter.

The definition of major rule is a rule which is estimated will have an annual effect on the economy of $100 million or more; cause a significant change in costs or prices for individual industries, geographic regions, or levels of government, such as state or local government; have a significant impact on conditions of employment or on the competitive process; or would otherwise have a major impact. The term major rule does not include rules implementing the Internal Revenue laws of the United States.

Section 601(5) defines "rule making" as having the same meaning as in Section 551(5), title 5, United States Code. Rulemaking is the term for agency processes by which rules are formulated, amended or repealed.

Section 601(6) explains that uses of the term "Board" are references to the Regulatory Policy Board established in Section 602 of this title.

Section 601(7) explains that references to the "Chairman" are references to the Chairman of the Regulatory Policy Board.

Section 602. Establishment of Regulatory Policy Board

Section 602(a)(1). This section mandates the creation of a seven-member Regulatory Policy Board. The Board will be composed of a member of the Council of Economic Advisers, the Chairman of the

Administrative Conference of the United States, the Director of the Office of Management and Budget and the Attorney General, as well as the heads of three agencies appointed by the President, at least one of whom shall be the head of an independent regulatory agency.

Section 602(a)(2). Every other year, the President shall designate, on a rotating basis, two of the members of the Board as Chairman and Vice Chairman of the Board.

Section 602(b). The President will, with the advice and consent of the Senate, appoint an Executive Director of the Board who shall be its principal executive officer. The Executive Director will be paid at Level III, 5 U.S.C. § 5314.

It will be the responsibility of the Executive Director to conduct the executive and administrative operation of the Board. In addition, the Executive Director will be prepared to perform extra functions as the President shall request.

Section 603. Functions of the Board.

Section 603(1) requires the Board to prepare and publish a semiannual Calendar of Federal Regulations. This calendar, to be drawn from the regulatory agendas published by each federal agency under section 611, will contain descriptions of all major rules likely to be under consideration over the succeeding twelve months.

Specifically, the Calendar shall include useful information about the rule. For example, it should specify the objectives and anticipated benefits of the rule, identify the agency official responsible for handling inquiries about each item, state the legal authority for the issuance of the rule and, to the extent practicable, provide a brief description of the economic impact of the rule.

The Board, in its discretion, may include in the Calendar other data or interpretations of data for use by Congress and the public.

The Calendar of Federal Regulations will be published regularly during the months of November and May of each year.

Section 603(2)(A) directs the Board to identify overlapping and duplicative rules promulgated by different federal agencies on the same or similar subjects. The Board will also be required to identify those single sectors of the economy, including particular industries or geographic regions, which are significantly affected as a result of the cumulative impact of rules promulgated by different agencies. The Board should utilize the regulatory agendas developed by each agency pursuant to Section 611, input from individual regulatory agencies and the public, and other tools to accomplish these purposes.

Under this authority and the authority contained in Section 603(3)(B) to monitor the implementation of all deadlines under Section 612, the Regulatory Policy Board should oversee applications for an authorization, permit, license, certification or similar approval from more than one federal agency. Where this multiple approval is necessary, where appropriate, the Regulatory Policy Board shall arrange conferences with all federal agencies involved and develop time schedules so as to encourage concurrent consideration and disposition of these matters. Conferences may not be necessary in all situations, *e.g.*, where by rule, memo of understanding or other agreement, the agencies involved have agreed in advance to specific deadlines.

Section 603(2)(B) authorizes the Board, if any of the above instances are identified, to establish interagency task forces to make recommendations to the President and the Congress proposing solutions to eliminate or greatly reduce any adverse effects which could result from such instances. Thus, if two agencies' rules appear duplicative, the Board would be authorized to bring the relevant agency officials together to discuss and try to resolve areas of conflict regarding jurisdiction, compliance, and enforcement, but may not overrule agency decisions.

Section 603 (3)(A) requires the Board to issue guidelines to facilitate agency compliance with several requirements in Chapter 6, most importantly the regulatory analysis requirement.

Section 603 (3)(B) requires the Board to review agency compliance with the requirements in Chapter 6 and to report on such compliance to the President and Congress. Among other things, the Board is required to review: (1) the quality of agency decisions on whether a rule is a "major" rule (Section 621); (2) how well agencies are performing the *regulatory analysis* requirements (Section 622); (3) how well agencies are complying with the provision requiring review of existing rules (Section 651); (4) how well agencies are performing the regulatory flexibility requirements (Section 632 and 633); and (5) whether agencies are assuring that individuals, small businesses, small organizations and small governmental jurisdictions are given ample opportunity to participate in the rulemaking process (Section 635).

To assist in executive and congressional oversight of the regulatory process, the Board is given the responsibility to report its oversight findings, with recommendations, to the President and the Congress.

Section 603(4) requires the Board to select and organize interagency reviews of up to twenty of the most significant major rules proposed each year. The Board may also review other additional rules which it finds should be reviewed due to exceptional circumstances. In conducting these reviews, the interagency groups are instructed to assess the initial regulatory analysis of each of these rules and to submit public comments for the record based on their evaluation of the proposed rule during the public comment period established by the agency.

The areas subject to comment shall include the need for the rule, whether projected reporting, recordkeeping, and other compliance requirements are accurate, whether stated or other alternatives may accomplish the stated objectives of the rules, and whether the projected economic effects and the projected health, safety and environmental benefits are adequately portrayed.

In reviewing the potential economic effects of such rules, the Board and review groups may contact and consult with the Council on Wage and Price Stability to assist in evaluating inflationary impact that might result from rulemaking proceeding.

Section 603(5) authorizes the Board to consult with state and local governments to devise model procedures and techniques aimed at identifying overlapping and duplicative reporting requirements imposed by federal, state and local governments.

Section 603(6) authorizes the Board to conduct the evaluations of regulatory programs under title III of this bill.

Section 603(7) authorizes the Board to determine whether a proposed rule constitutes a major rule under the definitions contained in Section 601(4) (A) or (B). This gives the Board the critical function of overseeing and, where necessary, overruling an agency's decision that a rule is or is not a major rule for the purposes of this chapter. If the Board determines that a rule is a major rule, contrary to the agency's decisions, the agency will be required to prepare an initial and final regulatory analysis. The Board must make its determination within thirty days following publication in the *Federal Register* of the general notice of proposed rulemaking for the rule and must provide the agency with written public notice of this determination together with a public statement of the reasons for making the determination.

Section 603(8) requires the Board to assist in coordinating the reviews by different agencies of existing regulations. This authority will be useful in achieving a coordinated review of existing federal regulations affecting a single industry or sector of the economy.

Section 603(9) authorizes the Board to oversee agency determinations that a rule will not have a significant economic effect on a substantial number of individuals, small businesses, small organizations or small governmental jurisdictions. Such a determination will relieve an agency of its responsibility to do an initial or final regulatory flexibility analysis. Therefore, the Board is charged with ensuring that agencies are making reasoned, good faith decisions when they determine that a regulatory flexibility analysis is unnecessary.

Section 603(10) directs the Board to prepare an annual report for the first fiscal years following the effective date of this chapter containing an analysis of the regulatory reform activities of all agencies subject to the provisions of this chapter. This report shall be transmitted to the President and to the Congress in October of the fiscal year following the fiscal year for which the report is made. The reports shall be made available to the public.

Section 604. Regulatory Management Information System

Section 604(a) requires the Executive Director of the Board, in consultation with the Director of the *Federal Register*, and the Office of Management and Budget to develop a regulatory management information system. This system will consist of categories under which agency rules can be grouped for indexing purposes. The categories will reflect the subject area of the rules, and the persons or classes of persons who are required to comply with the rules. Where possible, rules should be identified according to standard industrial classifications (SIC). The Executive Director shall transmit a copy of the categories to the head of each agency responsible for a regulatory function.

Section 604(b) requires the head of each of the agencies receiving a copy of the categories developed under subsection (a) to assign each of the rules of the agency into the applicable categories and transmit a copy of that classification to the Executive Director.

Section 604(c) requires the Executive Director to assemble a comprehensive index of agency rules, using the classifications submitted pursuant to subsection (b). The index shall be made available to small businesses and other interested persons. It is expected that the agencies and the Executive Director will use available data processing technology to index the rules and to make the index available to the public in its most useful form.

Section 604(d) requires each agency to compare the requirements of a proposed rule with the requirements of other rules indexed in the system in order to evaluate possible overlap or duplication. Where possible, the agency shall include the results of this comparison in the notice of proposed rulemaking. Since this section is in chapter 6, it will not be subject to judicial review.

Section 605. Administrative Provisions

Section 605(a)(1) authorizes the Executive Director of the Regulatory Policy Board to appoint, in accordance with the applicable sections of title 5 of the United States Code, the persons necessary to accomplish the objectives of this chapter.

Section 605(a)(2) authorizes the Executive Director of the Regulatory Policy Board to employ experts and consultants in accordance with the provisions of 5 U.S.C. § 3109.

Section 605(a)(3) authorizes the Executive Director of the Board to use, with their consent, the employees, services, equipment, funds, information and facilities of other federal departments and agencies and state, local, and private agencies and instrumentalities. The Board may use these resources without reimbursement or may provide reimbursement through transferral of funds made available to it pursuant to this subchapter.

Section 605(b) authorizes the Board to request the use of department or agency employees, services, equipment, facilities or information. Upon request, agency heads are to make these resources available to the Board as promptly and to the extent practicable.

Section 606. Data Collection and Disclosure

Section 606(a). The Regulatory Policy Board shall have access to all data and information pertaining to federal regulatory activities which is collected, generated or otherwise prepared or maintained by any agency unless such access is prohibited by law. This data or information is to be made available to the Board promptly uponr est.que

Section 606(b). The Board will adhere to the requirements of the Freedom of Information Act, Section 552, title 5, United States Code, in determining whether information will be disclosed. In making its determination whether to disclose information, the Board will also adhere to all applicable law, agency including rules about information obtained under a pledge of confidentiality. The Board may not disclose information which is obtained from an agency and exempt from disclosure under Section 552(b), title 5, United States Code, unless the agency consents in writing to the disclosure.

Section 606(c). This subchapter does not authorize the Board to violate existing privacy protection statutes. Specifically, in compliance with Section 7213 of the Internal Revenue Code of 1954 (26 U.S.C. § 7213), this subchapter does not authorize any agency to divulge or make know to the Board the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth in any income tax return, or to permit any income tax return filed pursuant to the provisions of the Internal Revenue Code of 1954 (26 U.S.C. § 1 *et seq.*) tobe examined by the Board.

Section 607. Authorization of Appropriations

The functions of the Regulatory Policy Board will be funded through the authorization of appropriations contained in this section. That authorization is for $5,000,000 a year for fiscal years 1981, 1982, and 1983.

SUBCHAPTER II—ESTABLISHING REGULATORY PRIORITIES AND SCHEDULES FOR COMPLETING PROCEEDINGS

Section 611. Regulatory Agenda.

Section 611(a) requires each agency to publish during October and April of each year an agenda of the rules that the agency expects to propose or promulgate during the next twelve months. In addition, the agenda shall briefly describe any probable areas of regulatory inquiry which it expects to have under consideration in the next twelve months. An agency would engage in a regulatory inquiry when it has an area under consideration which the agency believes may warrant rulemaking, but for which the agency has not yet developed a proposed rule. The agenda would not, however, require agencies to announce possible enforcement proceedings.

Section 611(b) requires the agency to include in the agenda, for each rule listed, a brief description of the rule being considered, a brief statement of the objectives and benefits to the public likely to result from the rule, the statutory authority for the issuance of the rule, dates on which the agency plans to take any action, and, if the agency estimates the rule will be a major rule, a brief description (to the extent practicable) of the economic impact of the rule.

Section 611(c) requires the agency to describe briefly, for each area of regulatory inquiry listed, the area under consideration, the objectives which the agency intends to achieve through proceeding with any future action, and whether the inquiry is likely to lead to the development of a major rule.

In order to involve the general public early in the regulatory process, each agency is required to invite suggestions from the public regarding areas of regulatory inquiry that are listed in the agenda.

In addition, each agency is permitted to use any mechanisms it finds useful, in its sole discretion, to obtain suggestions from the public on any area of regulatory inquiry listed. Thus, the agency may hold informal public meetings on the area of inquiry where agency officials can listen for suggestions and alternatives by the general public or create *ad hoc* advisory committees, made up of agency personnel and members from the public.

The section makes clear that the agency is not required to respond in any way to suggestions offered by the public about the listed areas of regulatory inquiry.

Section 611(d) requires the agency to identify in the agenda any existing rules, policies, or practices scheduled to be reviewed by the agency over the next twelve months in accordance with section 641, which establishes a system for periodic review of existing rules.

Section 611(e) requires the agency to identify the agency official responsible for handling inquiries about each agenda item. Such identification should at least include the official's name, title, address and telephone number.

Section 611(f) provides that in those instances where an agency decides to consider or act upon a rule that did not appear on the agenda, it may do so. Similarly, an agency will not be required to consider or act on any matter listed on the agenda. In the latter instance the agency shall include in the next agenda a brief explanation of its decision, solely for the information and guidance of Congress, the Regulatory Policy Board, and the public.

Section 612. Establishment of Deadlines

Section 612(a) requires each agency to include an announcement of the date by which it intends to complete final action on any matter that is expected to take longer than 120 days when it gives general notice of any proposed action under section 553(b) (informal rulemaking) or 554(b) (proceedings on the record) of title 5, United States Code. If the proceeding is expected to take more than one year to complete, the notice should indicate when each major portion of the proceeding will be completed. Deadlines are not required for the types of short-term proceedings that take less than 120 days.

Section 612(b) states that if any agency fails to complete action by the dates announced in the general notice, the agency shall publish in the *Federal Register* a new date for completion of the proceeding or a portion thereof. The published statement shall also explain why the agency failed to meet the deadlines originally set.

SUBCHAPTER III—ANALYSIS OF REGULATORY PROPOSALS

Section 621. Determination of Major Rule

Section 621 requires that before an agency publishes a notice of proposed rulemaking, it must determine whether a rule is a major rule under the definition contained in section 601(4). If the agency determines that a rule was not a major rule, it must publish a brief (2 or 3 sentence) statement of its reasons at the time it publishes the general notice of proposed rulemaking.

Section 622. Initial Regulatory Analysis

Section 622(a) requires an agency which is required to publish a notice of proposed rulemaking and which has determined that a rule is a major rule under section 621 to prepare an initial regulatory analysis. The regulatory analysis is an analytical tool which will encourage agencies to consider a broad range of economic and non-economic effects which may result from the proposed rule.

It should be emphasized that regulatory analysis imposes no new substantive standards on the agency. This section only requires agencies to consider regulatory approaches that are consistent with applicable statutes. Section 622(a) requires the agency to make the initial regulatory analysis available to the public without charge and to publish in the Federal Register a statement explaining how to get copies of the analysis.

Section 622(b) provides that the initial regulatory analysis should contain (1) a description of the reasons why regulatory action by the agency is required; (2) a brief statement of the need for and objectives of the rule and the legal basis (statutes and case law) of the rule; (3) a description of projected reporting and recordkeeping requirements to the extent that they are known at the time the initial rule is published; (4) an identification, where practicable, of other rules which the proposed rule may duplicate, overlap or affect; (5) a description of the most significant alternatives to the proposed rule that the agency calculates may accomplish the stated objectives of the rule in a manner consistent with applicable statutes; (6) a preliminary description of projected economic effects, including economic costs and benefits, and of the projected health, safety environmental and other effects which will result from the rule and from each alternative, together with an appraisal of the predicted effectiveness of the rule and of each alternative in meeting stated objectives of the rule. In describing the projected effects of the rule and the alternatives to the rule, the agency should attempt, wherever practicable, to identify those affected by the regulation.

Section 622(c) provides that an agency shall give the public at least 60 days to comment on the initial regulatory analysis.

Section 623. Final Regulatory Analysis

Section 623(a) requires an agency which has published an initial regulatory analysis under section 622, or which determines, based on public comments or changes in the rule, that the rule is a major rule under the definition in section 601(4) to prepare a final regulatory analysis. This analysis will be issued at the time of publication of the final rule. The section requires the agency to provide copies of the regulatory analysis free of charge to the public and to publish in the Federal Register a statement describing how members of the public can obtain copies.

Section 623(b) requires that the final regulatory analysis should contain: (1) a succinct statement of the need for and objectives of the rule; (2) a description of the alternatives which were considered by the agency and the reasons why they were rejected; (3) a detailed analysis of projected economic effects, including economic costs and benefits, and of projected health, safety, environmental and other effects which may result from the rule; (4) a summary of the significant public comments made in response to the initial regulatory analysis and a summary of the assessment made by the agency of such comments, including any changes made in the rule as a result of the comments; and (5) a description of any known reporting or recordkeeping requirements which will result from the rule. In carrying out its responsibilities under this section, an agency is required only to consider alternatives to the proposed rule that are consistent with applicable statutes. In describing the projected effects of the rule, the agency should, wherever practicable, identify those affected by the regulation.

Section 624. Effect on Other Law

Section 624 makes it clear that the requirements for the preparation of the initial and final regulatory analyses in sections 622 and 623 do not change the substantive or procedural standards applicable to the agency action pursuant to other statutes, except for those procedural standards otherwise established under this bill. Thus, if a statute directs an agency to establish "just and reasonable rates", the requirements in section 622 and 623 do not alter that mandate. They merely require the agency to consider the alternative methods for implementing the mandate.

Section 625. Preparation of Regulatory Analyses

Section 625(a)(1) informs agencies which are required to provide regulatory analyses, that such analyses need not be limited to a quantification or numerical estimation of the rule's effects. Instead, the agencies may make reasoned estimates of quantifiable and nonquantifiable effects of their proposals, basing such estimates upon experience and expertise of agency personnel and any other information made available to the agency by external sources. If, finally, such estimates are not practicable, due to the inherent difficulty in quantifying benefits, such as safety in the workplace, the agency should state generally a description of the nature and extent of the non-quantifiable effects of the rule.

Section 625(a)(2) requires agencies which utilize external sources of information in preparing a regulatory analysis (for those proceedings to be decided on the basis of a record) to include in the record copies of any information which was relied upon. In the alternative, the agency may make a reference to such information if copies would otherwise be costly or impractical.

Section 625(b) makes it clear that agencies are precluded from contracting out the preparation of an initial or final regulatory analysis. Agencies will still be authorized to contract for temporary or intermittent services of experts or consultants to assist in developing data for consideration in the analyses.

Section 626. Additional procedures in major rulemaking.

Section 626(a) establishes hybrid rulemaking procedures for major rules. It requires an agency engaged in the issuance of major rules to use, in addition to any procedure required by law, such oral or written procedures as it determines are appropriate for resolution of significant controversies over a material fact in dispute. In determining appropriate procedures, the agency is instructed to consider the expected impact of the proposed major rule, the nature of the facts in dispute, the number and types of persons interested in commenting on the dispute, and the length of time available for consideration of the proposed major rule.

The section enumerates several procedures which the agency is encouraged, but not required, to use in major rulemaking: (A) advanced notice of proposed rulemaking; (B) informal public hearings, meetings or conferences; (C) the creation of expert advisory councils; (D) mediation techniques; (E) the presentation of staff arguments for written comment and rebuttal; (F) the presentation of witnesses for direct or cross-examination; and (G) the opportunity for oral argument.

The section gives the agency virtually unfettered discretion to determine the additional procedures which are appropriate to resolve significant factual controversies; and the role of the court in reviewing an agency's choice of procedures is carefully circumscribed. The courts are not permitted to entertain interlocutory appeals with respect to an agency's determination of appropriate procedures. In reviewing an agency's determination as to which oral or written procedures are "appropriate for resolution of significant controversies over a material fact in dispute", the court may invalidate the rule only if the determination involved a procedural error which "is so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the determination had not been made." This standard of review is derived from the Clean Air Act (42 U.S.C. §7607).

Section 626(b) requires an agency to include in the notice of proposed rulemaking for a major rule a summary of the significant factual data and other information upon which the proposed rule is based, a description of the methodology used in obtaining and evaluating the data or information, and an identification of the reports, documents, studies or other information from which this data or information was derived. The purpose of this section is to permit the public to comment more effectively on agency rules. It is not intended to turn informal rulemaking into formal rulemaking. It should be pointed out that agencies are not required to comply with this subsection when they issue a final rule.

Section 626(c) requires an agency, which proposes to rely substantially on data or information not specified in the general notice of proposed rulemaking pursuant to subsection (b) above, to place such additional data or information in the file, to describe any methodology used in obtaining and evaluating such additional information, and to identify any reports documents or studies or other sources from which such data or information was derived. In addition, the agency must permit sufficient time for interested persons to respond to, or comment on, such additional data or information. This section does not require an agency to provide public comment on every new bit of information which it receives in a rulemaking proceeding. At some point the agency must proceed with the information available to it. However, where an agency intends to rely on information which was not previously available to the public and which is likely to affect the outcome of a proceeding, it should make a reasonable effort to allow public comment.

Section 626 (b) and (c) are derived from *Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 275 (D.C. Cir. 1973) *cert. denied*, 417 U.S. 921(1974).

Section 627. Elimination of Duplicative Analyses

Section 627 is designed to help reduce paperwork and delay by authorizing agencies to consider a series of closely-related rules or alternatives as one rule or alternative in complying with the requirements in sections 622 and 623.

In addition, agencies are given authority to use any data contained in other impact statements in the preparation of the regulatory analysis required by this chapter.

Section 628. Procedure for Waiver or Delay of Completion

Section 628(a) allows the head of an agency to waive or delay completion of an initial regulatory analyses pursuant to section 622, if he/she certifies, through publication in the Federal Register, that the agency's action is in response to an emergency which makes compliance or timely compliance impracticable. Such publication should be made no later than the date of publication of the final rule, and should include reasons for the waiver or delay.

Section 648(b), precludes waiver of the final regulatory analysis required in section 623. Thus, a final regulatory analysis must be performed and published with the promulgation of every major rule, including those developed in response to an emergency.

The completion of the requirement may be delayed (for not more than sixty days after the date of publication of the final rule) by the agency head only upon certification that such delay is due to an emergency which makes timely compliance impracticable. The certification should be made through publication in the Federal Register and should include reasons for the delay.

Section 629. Judicial Review

Section 629(a) provides that the decision by an agency or the Regulatory Policy Board with respect to what proposed rules are "major rules" under the definition provided in section 601(4) shall not be subject to judicial review. This decision is regarded as a management decision for determining when the agency shall conduct a regulatory analysis. It should remain in the sole discretion of the agency subject only to review by the Regulatory Policy Board provided in Section 603. This review mechanism is designed to assure effective oversight of major rule designations without unduly delaying these decisions by review in the Federal courts. Because judicial review of other parts of Chapter 6 has been treated specifically elsewhere, this subsection further provides that there is no judicial review of any action by an agency or the Board under any provision of this Chapter except as otherwise provided in the Chapter.

Section 629(b) provides that a regulatory analysis is not subject to judicial review because it is a management tool for improved rulemaking. Neither the manner of conducting regulatory analysis nor the content or sufficiency of the analysis should be subject to judicial review. Any agency's failure to comply with regulatory analysis requirements is subject to correction by the Regulatory Policy Board, not by the Judiciary. However, once a regulatory analysis has been prepared, its contents will be considered by the reviewing court along with other relevant material in determing the validity of the rule which is the subject of the analysis.

Section 629(c) provides that if another impact statement or analysis is required by a different statute, this section does not offset existing requirements for judicial review of that statement or analysis.

SUBCHAPTER IV—REGULATORY FLEXIBILITY

Sections 631 through 637 of title 5, United States Code, contain requirements for regulatory flexibility analyses of agency rules Such analyses are required for all rules which are likely to have a significant economic impact on a substantial number of individuals, small businesses, small organizations, and small governmental jurisdictions

In addition, agency heads are required to assure that individuals and small business, organizations and governments are given ample opportunity to participate in rulemaking proceedings during the normal course of informal rulemaking under Section 553 of title 5

The purpose of this subchapter is to require agencies to solicit and consider alternatives to proposed rules which would minimize their burdensome impact on individuals and small entities. These provisions encourage agencies to tailor their rules to the size of those subject to regulation whenever this is consistent with the stated objectives of applicable statutes.

Section 631. Definitions

Section 631 defines the four terms which have particular significance in this subchapter. These are "individual", "small business", "small organization", and "small governmental jurisdiction".

Section 631(1) makes clear that the term "individual" does not include any person who is affected by the rule primarily in his or her capacity as an officer or employee of a business or other entity.

Section 631(2) defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act (15 U.S.C. 631 *et seq.*). The Small Business Act has essentially a three-part definition of small business concern: (a) a business that is independently owned and operated; (b) a business which is not dominant in its field; and (c) a business which falls within the size standards regarding sales and/or employment established by Small Business Administration regulations.

It is not intended that the Small Business Act standards serve as an absolute benchmark. The Small Business Administration, for purposes of various loan, procurement and other Congressionally mandated programs, establishes standards to determine eligibility for various Small Business Administration programs. It is the most convenient and appropriate reference point for the analyses required under this Act.

However, there will be instances in which it may be sensible for an agency to issue differing regulations for various sized businesses, but to draw the line either above or below the applicable Small Business Administration size standards. The Act encourages an agency to vary the definition of small business in appropriate circumstances as long as certain procedural requirements are fulfilled.

It is the intent of the bill that agencies should first try to adopt the Small Business Act definition appropriate to their needs. There are two reasons for this approach. First, the Small Business Administration presently possesses most of the information and expertise in the federal government concerning business size. Second, requiring agencies to adopt the Small Business Act definition, when possible, would avoid conflicts between varying definitions in different agencies and the resulting public confusion.

If an agency can demonstrate that the Small Business Act definition is inappropriate it may adopt an alternative definition provided that: (a) the Office of Advocacy of the Small Business Administration is consulted; and (b) the new definition is adopted after giving the public an opportunity to comment on the proposed new definition. This provision does not require agencies to go through an entire rulemaking proceeding under 5 U.S.C. § 553 to establish definitions of small business (or of the other definitions in this subchapter). However, when considering changes in agency guidelines for this purpose, agencies must notify the public and provide opportunity for comments on the definition.

One definition of small business may not be appropriate when applied uniformly to all rules of an agency. Therefore, the bill gives agencies the flexibility to adopt different definitions of small business for application to a particular rule or category of rules. Caution should be used to avoid the confusion resulting from too many different definitions of small business within an agency. In addition, this flexibility should not be interpreted to require agencies to adopt separate definitions of small business for each regulation.

Finally, it is clearly not the intention of the section to alter the definitions of the Small Business Act, or the Small Business Investment

Act of 1958, or rules which have been promulgated by the Small Business Administration pursuant to those acts. Nor should an agency use its own definitions of small business permitted under this section to supersede the definitions contained in those acts. An agency may not, for example, redefine "small business" to relieve the agency of the obligation of complying with any rule of the Small Business Administration under which the agency may be required to act.

Section 631(3) defines "small organization" as a not-for-profit enterprise which is independently owned and operated and not dominant in its field. As with the definition of small business an agency may adopt another definition or definitions of "small organization" appropriate to its activities after opportunity for public comment. The intent of this provision is to cover all small concerns that may fall outside the definition of small business.

The phrase "not dominant in their fields" should be interpreted liberally with respect to non-profit public service organizations. While some such organizations, for example, YMCA's/YWCA's or Boy Scouts/Girl Scouts, may have activities nationwide, decisions on whether to treat them as small organizations should depend on an analysis of several factors. For example, the agency should examine the structure and operating characteristics of the organization at the local as well as the national level, and should consider the organizational resources and ability to comply with rules and reporting requirements at both the local and national levels.

It is not the intent of the bill that nationwide not-for-profit public service organizations be excluded from being defined as small organizations merely by virtue of their nationwide status.

Section 631(4) defines the term "small governmental jurisdiction" to include cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than 100,000 unless an agency establishes another definition or definitions appropriate to its activities after opportunity for public comment. Definitions established by an agency need not adhere strictly to the 100,000 population standards. Also of relevance are factors such as location in a rural or other relatively sparsely populated areas even if the total population of the government unit exceeds 100,000 in that particular governmental jurisdiction.

Section 632. Initial Regulatory Flexibility Analysis

Section 632(a) states that when an agency is required by Section 553 of title 5 or any other law to publish a general notice of proposed rulemaking, the agency must prepare an initial regulatory flexibility analysis of that proposed rule. This analysis will be a preliminary agency statement of the impact the of proposed rule on individuals and on small businesses, organizations and governmental jurisdictions. The initial analysis, or a summary, will be published in the Federal Register at the time the general notice of proposed rulemaking is published. The Committee expects that normally the entire analysis will be published rather than a summary. This is because a major purpose of the document is to solicit public comment on the proposed rule and alternatives. Moreover, the document is expected to be brief so that publication in its entirety will be practical. A copy of the initial analysis will also be sent to the Counsel for Advocacy of the Small Business Administration for his comments, if any.

Section 632(b) provides that the initial regulatory flexibility analysis will contain a description of any significant alternatives to the proposed rule which are consistent with the stated objectives of applicable statutes and which minimize any significant economic effect of the proposed rule on individuals, small businesses, small organizations, or small governmental jurisdictions.

Alternative approaches listed in this section include: (1) varying compliance and reporting requirements and timetables which take into account the limited resources of small entities; (2) clarifying, consolidating or simplifying the compliance and reporting requirements of the proposed rule for small entities; (3) adopting performance rather than design standards to provide greater flexibility for entities with limited resources; and (4) providing exemptions for small entities from all or part of the proposed rule or paperwork requirement.

Agencies are not limited to the listed alternatives of this subsection in their search for means to reduce the burdensome impact of a rule on small entities. In fact, it is expected that agencies will seek and discover other innovative techniques of tailoring regulations to small entities consistent with the stated objectives of the underlying statute authorizing the rule.

It is important to note that the bill does not require agencies to adopt all or any of the listed flexible alternatives in this section. Agencies must consider only those alternatives which are "consistent with the stated objectives of applicable statutes". If an alternative would not meet this test the agency is not required to adopt that alternative.

It is evident that not all of the listed alternatives are appropriate in each agency context, particularly with regard to laws protecting health, safety or the rights of specific groups. For example, a worker in a machine shop with fifteen employees must not be forced to operate dangerous machinery without the same basic safety protection as an operator of similar equipment in a huge factory.

Nor would this bill, as it applies to environmental laws, require or authorize an agency to allow a small chemical company to discharge a hazardous chemical such as kepone into nearby rivers while, because of the inherent danger involved, forbidding such action by a large firm.

The objective of regulatory flexibility is not to create a double standard of protection for beneficiaries of health, safety or environmental laws based on the size of the entity involved. The purpose is to require agencies to consider the wide range of diversity among regulated entities and try to tailor their regulatory requirements to the different circumstances which they face.

The term "significant economic impact" should not be interpreted to mean that agencies may ignore effects of the rule which are burdensome and non-trivial but not susceptible to precise quantification in economic terms. For example, the nature, complexity and frequency of reporting and recordkeeping requirements should be analyzed in each rulemaking whether or not these burdens have been strictly quantified. For example, a reporting form which requires extensive bookkeeping adjustments certainly has a significant impact on small business. An agency cannot avoid the requirements of this bill by suggesting that such a form does not have an "economic" effect.

Agencies should not give a narrow reading to what constitutes a "significant economic impact" for purposes of this section or other sections in which the term is used. The effect need not be significant on each business subject to the regulation for the total effect of a rule to be significant and thus subject to the agenda and analyses requirements.

Section 633. Final Regulatory Flexibility Analysis

Section 633(a) requires agencies to prepare a final regulatory flexibility analysis for rules promulgated pursuant to Section 553 of title 5, United States Code. The analysis must contain a statement of the need for, and objectives of, the rule; a summary of issues raised by the public and the agency's assessment of those issues; and an explanation of any changes made in the rule as a result of public comment.

In addition, according to Subsection 633(a)(3), the analysis must describe each of the alternatives to the rule which were considered by the agency and which were designed to minimize the burdensome effect of the rule on individuals and on small businesses, organizations and governmental jurisdictions. If the agency rejected such an alternative, it must give brief reasons for doing so.

By this latter requirement, the Committee does not intend that the agency must find that every alternative to the rule which it rejects is by definition one which would minimize the significant impact of the rule upon small entities. Some alternatives suggested by the public or agency staff for minimizing the impact of the rule on small entities may, after careful analysis, prove not to achieve that end. If so, a statement to that effect would satisfy the requirement of this section. The intent of this provision is to mandate a clear and succinct statement of the reasons for an agency decision not to adopt alternatives which would, in fact, have lessened the significant economic impact of the rule on small businesses, organizations and governments.

This provision does not require that an agency adopt a rule establishing differing compliance standards, exemptions, or any other alternative to the proposed rule. It merely requires that an agency, having analyzed significant alternative proposals, describe the alternatives and explain its rejection of any alternatives which, if adopted, would have been substantially less burdensome on the entities specified. A determination that an alternative would not have accomplished the stated objectives of applicable statutes would justify the rejection of the alternative.

Section 633(b) provides that copies of the final regulatory flexibility analysis will be available to members of the public. Agencies are directed to publish a statement in the Federal Register explaining how copies may be obtained.

Section 634. Avoidance of Duplicative or Unnecessary Analyses

Section 634(a) provides that agencies may perform the analyses required by Sections 632 and 633 (initial and final regulatory flexibility analyses) in conjunction with or as a part of any other regulatory analysis required by law.

Section 634(b) permits agencies to certify that a proposed or final rule will not have a significant economic effect on a substantial number of individuals or small entities. If the agency so determines, it must notify the Regulatory Policy Board and the public of its decision and its reasons. Following this determination, the agency is not required to prepare an initial or final regulatory flexibility analysis.

It is possible for this determination to be made at several points in the rulemaking process. If it comes prior to the publication of a general notice for proposed rulemaking, the agency must publish a statement explaining its decision at the time the general notice is published. If this determination is made after the general notice of proposed rulemaking but prior to publication of the final rule, the agency must publish and explain its decision when it is made or at least at the time publication of the final rule.

The term "significant economic impact" is, of necessity not an exact test. Because of the variety of small entities any more precise a definition is virtually impossible and may be counter-productive. The experience of agencies in defining "significant rule" under Executive Order 12,044 may be of some use in applying the test of this section. In addition, the Small Business Administration has prepared useful guidelines for measuring the impact of rules on small businesses which may be of assistance to other agencies as well.

The term "subtantial number" of small entities is intended to mean substantial numbers of entities within a particular activity. It is not meant to require agencies to find that a large percentage of the whole universe of small businesses, small organizations and small governmental jurisdictions would be affected. One particular rule may well affect a substantial number of school districts, for example, but have no impact on small businesses or organizations. Such a rule should be considered to have satisfied this portion of the test in such an instance.

Section 635. Procedures for Agency Consideration of Rules

Section 635 requires the head of any federal agency which is proposing to adopt a rule that would have a significant economic impact on individuals, small businesses, organizations or governments to assure that these groups have adequate opportunities to comment upon the rule prior to its adoption. Suggested methods include the following: (a) direct notification of interested individuals and small businesses, organizations and governments, (b) placing notice of the proposed rule in publications likely to be obtained by individuals, small businesses, organizations and governments; (c) the conduct of open conferences or public hearings; and (d) the adoption or modification of procedural rules to reduce the complexity or cost of participation in the rulemaking by individuals and small entities. The bill grants to agencies the discretion to choose among these and other methods of outreach.

The purpose of this section is to encourage agency heads to establish procedures designed to guarantee increased participation in rulemaking by individuals and small entities. The procedures mentioned herein are intended to be used as a part of the normal rulemaking process as required by chapters 5 and 6 of title 5, United States Code, and are not designed to establish separate procedures inconsistent with the remainder of title 5.

Section 636. Effect on Other Law

Section 636 makes it clear that the requirements for the preparation of the initial and final regulatory flexibility analyses in section 632 and 633 do not change the substantive or procedural standards applicable to agency action pursuant to other statutes, except for those procedural standards otherwise established by this subchapter. Thus, if a statute directs an agency to issue rules to "protect the public health", the requirements in Sections 632 and 633 do not alter that mandate, but merely require the agency to consider alternative methods for implementing the mandate which minimize unnecessary burdens on small entities.

Agencies are required to consider only those alternatives to the proposed rule which are consistent with the stated objectives of the statute authorizing the issuance of the rule.

Section 637. Report

Section 637 requires the Chief Counsel for Advocacy of the Small Business Administration to monitor and evaluate agency compliance with this subchapter. This Office must report at least annually to the Committees on the Judiciary of the Senate and House of Representatives and the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

SUBCHAPTER V—AGENCY REVIEW OF RULES, POLICIES, AND PRACTICES

Section 641. Periodic Review of Regulatory Requirements

Section 641(a) provides that within four months after the effective date of this subchapter, each agency affected by the subchapter will have prepared a list of its major rules promulgated prior to the date on which preparation of the list is to be complete. Major rules are defined in section 601(4) of the legislation.

Section 641(b)(1) provides that within eight months after the effective date of this subchapter, each agency will have prepared and published for comment in the Federal Register a draft schedule under which major rules and selected additional rules, policies and practices of the agency will be reviewed over a five-year period beginning with publication of the final review schedule.

During each of the five years of review, the agency will review ten percent of the major rules listed pursuant to section 651(a) but no more than a total of ten rules; it is also encouraged to review additional rules, practices and policies as the agency may choose.

Section 641(b)(2) requires that the agency explain why it selected the rules, policies and practices for review. In making its selection, the agency should consider (1) the extent to which the rule, policy or practice has significant economic health, safety, environmental or other effects; (2) the extent to which the rules, policies or practices duplicate, overlap, or conflict with any other federal rule, policy or practice; (3) the length of time since the rule, policy or practice was adopted or became established; (4) the nature of any technological, economic, social or other changes which have taken place since the rule, policy or practice was adopted or became established; (5) the effectiveness and efficiency of the rule, policy or practice in achieving its stated objectives; (6) whether the rule, policy or practice can be readily understood by those affected by it; and (7) any comments made by members of the public concerning the effects of the rule, policy or practice as implemented by the agency.

Rules, policies and practices which have evidenced problems in more than one of the areas listed above would clearly be targets for review. Once the agency has determined which rules, policies and practices should be reviewed, it will proceed to ensure that those rules, policies and practices most in need of improvement will be reviewed first. Rules, policies and practices which appear to be overlapping outdated, conflicting, unclear or ineffective will be considered targets for early review.

Section 641(c) requires that no later than one year after the effective date of this legislation (four months after publication of the draft schedule), each agency will publish in the Federal Register a final schedule for review of rules, policies and practices. The final review schedule will include, for each rule, policy and practice, a brief (2 or 3 sentence) explanation of why the rule, policy or practice was selected for review and a date by which that review will be complete. The agency will include a summary of the significant comments received from the public concerning the draft schedule in the publication of the final schedule.

Section 641(d) requires, beginning on the effective date of this legislation, that no affected agency may publish a final major rule without publishing a scheduled date for review of that rule. The review date must be within ten years of the publication of the final major rule.

Section 641(e)(1) provides that the agency must publish a notice in the Federal Register at least 30 days before a major rule is scheduled for review, and must request public comments on the rule.

The product of the review of a major or selected rule, policy or practice will be either an assessment of that rule, policy or practice, or publication of a notice of proposed rulemaking. It is anticipated that if the agency determines that no changes in the rule, policy or practice are necessary, it will simply prepare an assessment and place a summary of that assessment in the Federal Register. If, however, the agency determines that changes in the rule, policy or practice are necessary and possible, it is encouraged to publish a notice of proposed rulemaking to make whatever changes are necessary and possible. The assessment to retain the rule would not constitute a notice of proposed rulemaking.

Section 641(e)(2) provides that the assessment of proposed rulemaking must include a statement of the following: (1) economic, health, safety, environmental and other benefits provided by the rule, policy or practice; (2) adverse economic effects, including costs and other effects of the rule, policy or practice; (3) cost and nature of any problems encountered by the agency in obtaining compliance with the rule, policy or practice; and (4) where practicable the extent to which the rule, policy or practice overlaps with or duplicates other federal rules, policies or practices, including rules, policies or practices of other agencies.

Section 641(e)(3) requires that an agency issue in its assessment (1) a recommendation as to whether enforcement policy should be improved; or (2) whether the rule, policy or practice should be rescinded or amended in order to make it more efficient or effective. In addition, the agency is required to include in its assessment a summary of the major issues raised by the public comments and a summary of the agency's response to such issues.

Section 641(e)(4) provides that copies of assessments are to be available to the public at no cost. Federal Register publication of the summary assessment will describe how the public can obtain copies of this assessment.

Section 641(f) allows amendment of review schedules with the consent of the Executive Director of the Regulatory Policy Board. Amendments must be published in the *Federal Register*.

Section 641(g) states that the agency review of rules program has the potential for extension. The President will assess progress under this subchapter after four of the five years of review and will submit a report of his determinations to Congress. If appropriate, the President will recommend to Congress that legislation be passed extending for an additional five-year period.

SUBCHAPTER VI—AGENCY COORDINATION OF RULEMAKING

Section 651. Applicability

Section 651(a) provides that the requirements of the subchapter apply to any rule for which the agency must publish a notice of proposed rulemaking under the Administrative Procedure Act, and any rule which the agency was not required to publish a notice of proposed rulemaking because of the "emergency" provision in Section 553(a)(1).

Section 651(b) provides that after the emergency is over, the agency should comply with the provisions of the subchapter as soon as practicable after the promulgation of the rule.

Section 652. Notification and Comment

Section 652(a) provides that each agency listed in section 652(b) should notify certain other specified agencies, as soon as practicable, but not later than the date on which an agency publishes a notice in the Federal Register, of the proposed rule and any analysis of the rule required by law. The agency which receives this notification may make any written comments it finds appropriate concerning the proposed rule within a reasonable time after the publication of the notice in the Federal Register.

Section 652(b) lists fifteen agencies which are subject to this requirement, as well as the agencies which must be contacted. For example Section 652(b)(1) requires the Department of Agriculture to notify the Council of Economic Advisers and the Antitrust Division of the Department of Justice.

Section 652(c) provides that the Regulatory Policy Board may designate additional agencies to comment on proposed rules and may request an agency to comment on the policies of another agency.

Section 652(d) provides that any agency which submits comments on another agency's rules pursuant to this subchapter should simultaneously send those comments to the Office of Management and Budget.

Section 652(e) makes it clear that an action of an agency under this Subchapter is not subject to judicial review, and that any written comments by an agency under this subchapter shall be included in a public rulemaking file.

Section 102(b) amends the table of chapters to include the new chapter 6.

Section 102(c) adds the Executive Director of the Regulatory Policy Board to the list of persons who receive compensation under section 5314 of title 5.

Section 103. Presidential Authority

Section 103 of the bill makes it clear that nothing in this act limits the exercise by the President under the Constitution and laws of the United States or by the Director of the Office of Management and Budget under the laws of this country of their authority and responsibility with respect to regulatory policies and programs of departments, agencies and offices.

TITLE II—IMPROVING THE EFFICIENCY OF ADMINISTRATIVE PROCEEDINGS

PART A—ADMINISTRATIVE PROCEDURES—INFORMAL RULEMAKING

Section 201. Improving the Quality of Agency Rulemaking

Section 201(a) of this bill consolidates the exemptions to notice-and-comment rulemaking into a revised section 553(a). The exemptions for military and foreign affairs functions and matters relating to agency management or personnel are retained and redesignated as sections 553(a)(1)(A) and 553(a)(1)(B) respectively.

The exemptions from the notice requirement for rules of agency organization, procedure or practice are consolidated with the agency management and personnel exemptions in section 553(a)(1)(B). Likewise, the exemption for interpretative rules and general statements of policy are continued and redesignated as sections 553(a)(1)(E) and 553(a)(1)(F) respectively. The exemptions from notice-and-comment rulemaking procedures for rules relating to public property, loans, grants, benefits or contracts have been narrowed. These exemptions will now apply only to those rules that are issued pursuant to the standards established by the Office of Federal Procurement Policy or the Administrator of General Services. In addition there is still an exemption for matters relating to public property or contract of a owned government corporation like the Tennessee Valley Authority. Since most of the exempt rules under the new section 553(a)(1)(C) are already subject to comparable notice and comment procedures established by other statutes, the public would have input in the development of all proprietary rules.

Section 553(a)(1)(D) provides that the agency need not comply with the section when promulgating an emergency rule or a rule governed by short-term statutory or judicial deadlines. It retains the exemption for rules for which notice and public procedure is impracticable, unnecessary or contrary to the public interest.

Section 553(a)(2) narrows the emergency rule exemption by requiring compliance with section 553, wherever appropriate, after the publication of the rule. It also requires that when an agency makes a finding under section 553(a)(1)(D) that it publish the rule in the Federal Register with a statement of the finding and the reasons for such finding.

Section 201(b) of this bill sets forth the minimum requirements for notifying the affected public of a proposed rulemaking. Notice must be published in the Federal Register unless all persons substantially interested in the matter are named and personally served or otherwise have actual notice of the rulemaking. Under present law service of the notice is required only for those persons subject to the proposed rules. This language alters existing law by expanding the service exemption to all persons substantially interested in the matter.

The material to be included in a notice of proposed rulemaking is also expanded. As under present law the notice must include either the terms or substance of the proposed rule or a description of the subjects and issues involved. It must also include a statement of the time, place, and nature of public rulemaking proceedings. The bill modifies the language in current law by requiring a description of the legal basis instead of the legal authority, of the proposed rule. This change is designed to require an agency to give a brief discussion of the legal basis for the proposed rule (for example, statutes, case law, agency precedents) instead of permitting it merely to refer to an authority without any explanation. Finally, where the agency reasonably anticipates that a reporting or recordkeeping requirement will result from the proposed rule, the agency must: (1) state, to the extent practicable, the purpose of the requirement together with a description of any forms and the type of professional skills necessary for the preparation of the record or report; (b) estimate the classes and numbers of persons who will be required to submit or maintain the reports or records; and (c) estimate the time required to complete the reports or records. This will enable the public to comment not only on the potential burden or benefit from compliance with the proposed regulation but also on the paperwork burden which may result from the agency's action. It will also provide a forum for public comment directed at clarifying, simplifying, or consolidating paperwork requirements.

Section 201(c) of this bill makes a few technical corrections in section 553(c) but continues the procedures for receiving public input in the formulation of federal rules contained therein.

Where rules are required by statute to be made on the record section 554 would govern. This requirement is redesignated as section 553(c)(2).

Section 201(d) of the bill clarifies the requirement of existing section 553(d) by providing that agencies publish a final rule not less than thirty days before the effective date of the final rule, except in the case of a rule that grants or recognizes an exemption or relieves a restriction and unless a longer period of time is required by law or if the agency finds for good cause that it cannot comply with this restriction. The main change is to clarify that the agency can publish the rule with less advance notice where persons subject to the rule are either personally served with, or have actual notice of the final rule. In addition to clarifying the language of the existing statute, section 553(d) is amended to require that agencies respond to significant issues raised by the comments received by the agency concerning the proposed rule. This incorporates existing agency practice and case law into statute. *See Portland Cement Ass'n.* v. *Ruckelshaus*, 486 F. 2d 275 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1974).

Section 201(e) of the bill redesignates section 553(e) as section 553(f) and adds a new section 553(e). Under the new section 553(e), the agency must maintain a public file in all informal rulemaking proceedings. The file will contain: (1) the notice of proposed rulemaking and any supplemental notices; (2) copies or identification of all studies and documentary material substantially relied on by the agency in formulating the rule; (3) copies of all written public comment; (4) copies of all material the agency is by law required to make public as part of the rulemaking; (5) any statement, description or analysis required to be prepared by the agency in formulating the rule; and (6) records of outside communication if required by law.

Section 553(e)(2) makes clear that the agency is not required to include in the file any material exempt from public disclosure under section 552(b), the Freedom of Information Act, if the agency includes in the file a statement noting the existence of such material and the basis upon which the material is exempt.

Section 202. Ex Parte Communications in Informal Rulemaking

Section 202 provides that within one year of the effective date of this bill, each agency shall conduct a rulemaking proceeding pursuant to the notice and comment procedures in section 553 of the APA to consider procedures concerning ex parte communication in informal rulemaking proceedings.

PART B—ADMINISTRATIVE PROCEDURES

Sections 211 through 215 amend sections 554 through 558 of the Administrative Procedure Act concerning proceedings required by statute to be decided "on the record after opportunity for agency hearing." These sections encompass proceedings such as formal rulemaking, adjudication, and licensing. The purpose of these amendments is to reduce unreasonable delay in the agency decision-making process and increase the ability of decision-makers to analyze the policy issues involved.

Provisions governing on-the-record proceedings in sections 554 through 557 have been reorganized to achieve greater clarity. Section 554 now contains the provisions in title 5 which apply to all on-the-record proceedings. Additional provisions applicable only to expedited proceedings appear in a new section 555 (created in bill section 212). Provisions governing a full, trial-type hearing, provisions are placed in section 556 (amended in section 213 of the bill).

The Committee stresses that this reorganization is intended only to improve the coherence of the Administrative Procedure Act and not to disturb case law predicated on the prior structure.

Section 211. Proceedings on the Record

Section 211 contains a number of technical amendments to section 554 of the APA. These amendments conform section 554 to other amendments contained in sections 212, 213, 214 and 215 of the bill. They reorganize a number of existing provisions of the APA and explicitly describe the responsibilities of the presiding employee.

Section 554(a) of the APA is amended to clarify that section 554 applies to rulemaking proceedings required to be made on the record as well as to adjudications. The title of section 554 is therefore changed from "Adjudications" to "Proceedings on the Record" to indicate more clearly the scope of the section. This is not a substantive change in the APA. Currently, formal rulemaking proceedings are governed by section 554.

New paragraph 554(a)(2) briefly explains which APA provisions are applicable to hearings involving on-the-record proceedings. Such hearings are to be conducted in accordance with subsections (b) through (d) of section 554, and with sections 555 (if an expedited proceeding) or 556 (if nonexpedited). The paragraph also clarifies that a different hearing procedure may be established by other statutes for a class or classes of proceedings.

Section 554(b) concerning notice of a hearing remains essentially unchanged from the current version except that, for purposes of clarity, the term "moving parties" is changed to "parties initiating the proceeding."

Provisions now in subsection 556(b) have been moved to paragraph (A) of section 554(c)(1). This language provides that a presiding employee may be the agency, a member of the body comprising the agency, or an administrative law judge.

Section 554(c)(1)(A) makes another technical modification to conform to other changes made to this bill. Section 221 of the bill repeals section 3105 of title 5 which provides for appointment of administrative law judges and replaces it with a new section 802. Thus, section 554(c) refers to section 802 in order to confrom with section 221 of this bill.

The final sentence in section 554(c)(1)(A) essentially restates language formerly in section 556(b) which provides that special administrative procedures established for certain classes of proceedings by other laws are not superseded by this paragraph.

New paragraph (B) of section 554(c)(1) clarifies an ambiguity in the current APA. Section 554(d) of the current APA fails to specify what happens if a presiding employee becomes unable to continue his or her duties, for example, because of serious illness or retirement. Section 554(c)(1) states that in such a case another qualified employee may be appointed by the agency to take his place and conclude the hearing. The change, recommended by the Administrative Conference, should help assure that most proceedings will not have to begin all over again if the presiding employee becomes unavailable to the agency. Current case law, however, that requires a completely new hearing where the credibility or demeanor of witnesses or other matters are critical to the outcome of the case would not be changed by this amendment. Continuation of the hearing with a new presiding employee is discretionary with the agency, subject to considerations of fairness.

The wording currently in 556(b) requiring presiding employees and employees participating in decisions in accordance with section 557 to conduct proceedings in an impartial manner is moved to new section 554(c)(1)(A) and additional, conforming language is added to make it clear that the functions of employees assisting or otherwise advising the presiding employee will be conducted in an impartial manner. Also moved to this paragraph, and conformed with the rest of the bill, is the prohibition, now in the second sentence of section 554(d) against the presiding employee being subject to the supervision of an agency employee engaged in "investigative or prosecuting functions". The word "prosecuting" is changed to "litigating" to broaden the category of employees affected. This change is discussed in connection with new section 554(d), which makes an identical change in the language.

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Under existing law section 554(c) describes in part some of the trial-type procedures that must be provided in all cases subject to this section. Under the procedures proposed by this bill, such formal trial-procedures will be applicable only in some cases, and for limited purposes. This wording has been separated, therefore, from the remainder of the section and placed in a new section 556.

Section 554(c)(2), which was formerly Section 556(c), permits employees who preside at formal hearings to, among other things: (1) hold conferences for the settlement or simplification of the issues upon the initiative of the presiding employee or at the request of the parties; (2) ask such questions or conduct such cross-examination as the presiding employee believes are appropriate; and (3) request the agency to consider and act on interlocutory appeals when agency action on such appeals would help expedite final agency action.

Paragraph (3) of section 554(c) of the Act, as amended by the bill, contains new provisions not found in the current Act. This new wording is also designed to ensure that the presiding employee takes an active part in shaping the nature and extent of the record. It will be the presiding employee's affirmative duty to see that both the discovery stage and other pre-hearing stages, as well as the hearing stage itself, are completed in an expeditious manner. The presiding officer will also have the duty to see that the record is a concise one and contains only those matters that are relevant and material to a decision. It will be his or her affirmative duty to exclude repetitious material from the record. Although the language does not require the presiding employee to establish further deadlines, the provision does authorize the presiding employee, in his discretion, to establish such deadlines for the completion of the hearing, or any other portion of the proceeding, in accordance with overall deadlines established by the agency pursuant to title I of this bill. The presiding employee is encouraged to rule on any question of law or fact where by doing so the employee can help narrow and define the issues, and thus control the scope and length of the proceeding. The presiding employee will also be authorized to take any other appropriate action authorized by the subchapter, or any other applicable law, to assure prompt agency disposition of the matter.

Section 554(c) as amended is intended to clarify the responsibilities and authority of the presiding employee to conduct proceedings in as effective and efficient a manner as possible. The Administrative Procedure Act bestows considerable authority on the presiding employee. The provisions described above expand such authority and seek to reemphasize the right and duty of the presiding employee to exercise such authority.

Section 554(d) deals with "separation of functions" requirements in agency proceedings which govern communications between the presiding employee and other agency employees during the course of the proceedings. Existing law prohibits agency employees who preside over a hearing from consulting anyone off the record on a fact in issue, and further prohibits discussion of any kind between those involved in the decisionmaking process and any employee engaged in an investigative or prosecuting function in the same or factually related case. The current provisions do not apply to licensing or to ratemaking or formal rulemaking proceedings. Section 554(d), as revised by the bill, changes the separation of functions provisions in several ways.

First, the bill extends the category of agency employees barred from having any role in participating or advising in the agency decision. The third sentence of current section 554(d) prohibits any employee or agent "engaged in the performance of investigative or prosecuting functions for an agency in a case" from participating in the agency's decisionmaking process.

The prohibition in the current law bars involvement in the decisionmaking process by those "prosecuting" the case on behalf of the agency. Since the word prosecuting fails to accurately describe all the kinds of formal proceedings which may now be subject to the prohibition of this section, the term litigating has been substituted for it. Paragraph (3) of subsection (d), as amended, specifically provides that the term litigating does not include participation in a judicial proceeding concerning the agency action. For example, an agency official involved in a court appeal of a case would not, by that fact, be barred from subsequent agency consideration of the matter if the court remanded the proceeding to the agency for further action.

The current subsection's prohibition against communications between investigators or prosecutors and decisionmakers does not apply to rulemaking, including ratemaking, and requests for initial licenses which must be decided in formal, on the record proceedings. The bill would extend the third sentence of section 554(d), governing those involved in investigating or litigating functions, so that the prohibitions apply to all proceedings conducted as formal, on the record proceedings. As a result, the bill extends the separation of functions provisions for the first time to initial licensing, ratemaking, and other formal, on the record rulemaking. As a practical matter, agencies have in many cases applied the rules on separation of functions to formal licensing and ratemaking proceedings without unduly restricting their flexibility. Both the Administrative Conference and the American Bar Association have studied this matter for a number of years. They both support the general principle that these procedural protections should apply in some form to such formal on-the-record proceedings. Statement of the Administrative Conference and the American Bar Association on S. 1720 (95th Cong.), *Cong. Rec.* Senate, June 20, 1977, S. 19881–19885.

The amendment is intended to broaden the current prohibition by eliminating any suggestion that the bar only applies to the agency attorneys in the hearing room that actually present the agency's case to the presiding employee. The new language is intended to include economists and other agency experts that actively assist agency lawyers in preparing and presenting the agency's case over a substantial period of time.

Employees may come within the terms of this provision if they frequently consult with agency employees on the preparation of pleadings, sit alongside the lawyers during the proceedings to advise them, or otherwise take a sustained interest in promoting the agency's case to the extent that, like a litigating lawyer, they develop a "will to win." This includes an agency employee who testifies to any significant degree in a proceeding on behalf of the proposed agency position. The wording does not affect an agency employee otherwise removed from involvement in the planning or implementation of the agency's case, or a factually related matter, who is sought out infrequently by agency litigators for advise on substantive or procedural issues in the case. Other employees in the same bureau as those litigating or investigating the case, including employees with overall supervisory responsibility for the investigator or litigator, are no more automatically barred by the amendment from a later decisionmaking role than under current law. The applicability of this ban to such employees will depend on all the circumstances.

As in current law, the amendment retains the exemption for members of the agency itself. The exemption permits such agency members involved in the decision to initiate an investigation or adjudication to take part in the final decisionmaking process. It also permits an employee whose only involvement with a case is to act as a personal assistant to the agency members during either the investigative or adjudicatory stage of the proceeding, or during both stages of the proceeding, to participate as well in the decisionmaking process. Such a person might be a law clerk to a commissioner. The exemption for members of the agency does not allow investigators or litigators to advise commissioners on how to decide a case.

Second, paragraph (1) of new subsection (d) modifies the prohibition, now in the second sentence of 554(d), against the presiding employee talking to any person or party on a fact in issue. The prohibition applies only after the initiation of the proceeding, so that it does not affect consultation that may have occurred prior to that time.

Currently, the prohibition in section 554(d) does not apply in any respect to initial licensing, or formal rulemaking. This flat exemption is repealed. On the other hand, the Committee wished to make it as clear as possible that this change was not intended to cut the presiding employee off entirely from obtaining the help of agency experts in understanding the often highly technical nature of the record in such types of proceedings. The provision, as amended by this bill, would prohibit the presiding employee in any type of proceeding subject to section 554 from, in effect, taking off-the-record additional factual testimony on a fact in issue from any person or party, including any other agency employee. On the other hand, it permits the presiding employee in licensing and rulemakings to seek out the help of agency experts to interpret the meaning of material already in the record, and to explain the issues raised by the material already in the record. Since legal, policy, and factual issues may be inextricably connected in such instances, the exemption will allow such consultations to go on even if, to some extent, it involves consultations "on a fact in issue." The amendment is not intended to change the meaning of the current phrase barring consultation "on a fact in issue" as it applies to the types of adjudicatory proceedings already covered by current section 554(d).

The wording of section 554(d)(1) is further changed by inclusion of references to the employees who assist or otherwise advise the presiding employee under section 554(e)(4), or who review the record as part of an employee board pursuant to section 557. These are conforming changes to reflect the new provisions in section 554(e)(4) and section 557. They are not intended to prohibit, by implication, presiding employees from consulting, with their own law clerks or to prohibit employees who assist or otherwise advise the presiding employee from consulting with the presiding employee or among themselves. On the other hand, specific reference to employees assisting under subsection (e)(4) is intended to prohibit employees assisting the presiding employee, such as a law clerk, from consulting with any person or party on a fact in issue.

Section 212. Expedited Hearing Procedure

Section 212 of the bill adds a new section 555 to the Administrative Procedure Act. New section 555(a)(1) permits an agency to use a new expedited procedure in any proceeding which predominantly concerns issues of general policy rather than specific factual issues. Specifically mentioned are ratemaking, rulemaking and initial licensing proceedings.

Section 555(a)(1)(A), however, prohibits agencies from using this expedited procedure for proceedings to impose civil penalties or fines or to establish whether a culpable violation of law has been committed. This is because such actions typically turn on factual disputes over responsibility for misconduct rather than on questions of policy. Thus, because of their accusatory nature, a full trial-type proceeding, conducted under section 556, is entirely appropriate. Examples of such cases are proceedings to recover penalties for violations of the Coal Mine Health and Safety Act (30 U.S.C.A. §§ 801–961 (Supp. 1978) conducted under 30 U.S.C. § 820 (Supp. 1978)), unfair labor practice cases, and penalty proceedings under the Occupational Safety and Health Act, 29 U.S.C. § 659 (1976).

Section 555(a)(1) also contains an exemption from the expedited procedure for claims by an individual for a benefit based on certain conditions. The major example in this category is Social Security claims.

As amended by the Committee, the general hearing process would be applicable at an agency's discretion. Paragraph (1) of section 555(a) outlines the kinds of proceedings to which the new procedures should apply: specifically, "any agency proceeding subject to" section 554(a) "which predominantly concerns issues of a general character, including ratemaking, rulemaking, and initial licensing, rather than a proceeding which predominantly concerns specific factual questions requiring trial-type procedures for their resolution."

The agency will have to make the judgment whether on balance the issues likely to be raised by a proceeding are the type more effectively, or more efficiently, considered under the general hearing process, or whether the nature of the issues and requirements of fairness require consideration of the entire proceedings as a formal evidentiary hearing. The more policy-oriented a proceeding is, the more appropriate becomes the use of the procedures outlined by this subsection, even if certain factual disputes are likely to arise which may require use of subsection (c) procedures.

Paragraph (2) of section 555(a) requires that an agency issue a procedural rule which designates the categories of proceedings to which the general hearing process shall apply. The categories may be as broadly defined as the agency determines appropriate. However, failure of a specific proceeding to fall within one of the predetermined categories would not bar an agency from applying the expedited procedures.

Section 555(b) describes the procedures applicable to all hearings conducted under this subsection. First, the person initiating the proceeding must submit in written form, at the time the proceeding is initiated, all the facts and arguments upon which such party initially proposes to rely. However, this initial submission is not required where the agency finds that it will unduly delay the proceeding or materially prejudice the rights of any party. After appropriate discovery procedures, the presiding employee will conduct a hearing addressing all relevant questions of law and fact.

The hearing will provide an opportunity for persons participating to submit any data, views, or arguments on the facts and law relevant to the case as it wishes. This may include affidavits or other written material. An opportunity to present written responses to the data, views or arguments submitted by other parties would be permitted where appropriate. Whenever a participant in the proceeding requests, the presiding officer will provide an opportunity for participants to argue their views orally in a legislative hearing. Participants in the oral hearing may not, however, call witnesses or cross-examine other participants.

Section 555(c) provides that certain issues may be designated for a trial-type hearing. The standards are intended to limit trial-type hearings to only those questions where a hearing of this kind is essential. The presiding employee must find there is "a genuine and substantial dispute of fact," including a dispute involving factual assumptions or methodology upon which expert opinion is based, which can only be resolved with sufficient accuracy by the introduction of reliable evidence in a formal hearing. A "genuine and substantial dispute of fact" refers to a specifically identified factual dispute such as whether a particular study followed specified testing procedures, rather than a dispute over such ultimate conclusions as whether a drug is safe. In addition, the issue in dispute must be one on which the resolution of the case is likely to depend in whole or in part. This may include a specific factual question which goes to the credibility of an expert witness.

At the time the presiding employee designates a dispute for a trial-type hearing, the official must specifically state in writing which factual disputes will be the subject of the hearing, and why the decision of the agency is likely to depend on the resolution of such facts. The hearing will be limited to only those factual disputes specified by the presiding employee. The presiding employee may, if appropriate, designate factual disputes for cross-examination after that particular issue has been discussed in the first stage of the hearing, or when all aspects of the first stage hearing have been completed. The provision, however, bars the presiding employee from designating the questions requiring a trial-type hearing before the first stage hearing on the issue has been completed. Experience suggests that otherwise many of the advantages of the proposed procedures will be lost.

Courts should only reverse the agency's exercise of discretion under this paragraph only if the agency's action was an abuse of discretion which substantially prejudiced the rights of participants. Otherwise the agency's choice of procedure should not be disturbed.

Section 555(d) authorizes the agency to designate one or more employees to assist the presiding employee by questioning parties at an oral hearing, or otherwise advise the presiding employee during the general hearing stage of the proceeding. Under the bill, the general hearings will become less adversarial, and more focused on the policy issues involved. The presiding officer may well benefit by the assistance of scientists, doctors, economists, or other experts in developing or understanding the complex issues that often underlie the policy choices involved. They may sit, for example, with presiding employees and assist in asking questions or consult with the presiding employee off the record. The bill makes clear, though, that no employee designated under the subsection will have any authority to issue any findings, decisions or other orders in the proceedings. Employees designated under this paragraph and the presiding employee may hold unlimited off-the-record conversations among themselves about any aspects of the proceedings. The separation of functions provisions in section 554(d) govern conversations between employees designated under this subsection and other agency employees or outside parties, but not conversations between such employees and the presiding employee.

Section 213. Formal Hearings

Section 213 contains amendments to section 556 of the APA, which governs the conduct of formal trial-type hearings, and the duties and power of presiding employees.

Section 556(a) is amended to change the application of this section to all proceedings subject to section 554 except any proceeding, or initial portion of a proceeding, which is conducted pursuant to the expedited procedure of section 555. This conforms section 556(a) to other changes made by the bill in earlier sections.

Section 556(b), Section 554(c)(1) in the current APA is redesignated as section 556(b). No change in wording is made by the redesignation.

Section 556(c) contains language which formerly appeared in section 554(c)(2). Standard changes are made to conform this section with the grammatical style appropriate for its new location.

Section 556(d) contains the authority, currently provided in section 556(c), of the presiding officer to rule on offers of proof and receive relevant evidence. Section 556(d) is further amended to encourage reliance on written material rather than oral hearings. It authorizes the presiding employee to require the introduction of direct evidence (including rebuttal evidence) in written form if an oral presentation of testimony is not necessary for a full and true disclosure of relevant evidentiary facts, and denial of such opportunity would not materially prejudice a party. The amendment removes any uncertainty about the authority of an agency to require the submission of direct evidence in written form regardless of the kind of formal proceeding involved.

The bill also amends section 556(d) to make clear that the presiding employee may upon motion issue a summary judgment at any time in the course of the proceeding where it is clear from the evidence submitted or exchanged that there is no genuine and substantial dispute as to any material fact and that the moving party is entitled to a judgment as a matter of law. This may occur, for example, after the pre-hearing conference, or after one side has submitted its case. In such instance, the development of a further evidentiary record only delays the final agency disposition in the matter. The agency through its presiding employee, should be free to conclude the evidentiary stage of the hearing at that point, just as a court may issue a summary judgment to avoid unnecessary further proceedings.

SEC. 214 AGENCY REVIEW OR DECISIONS

Section 557(a) is amended by replacing a reference to section 556 with a reference to section 554. This conforms this section with earlier amendments.

Section 557(b)(1) is amended to make several technical wording changes. The word "hearing" is used instead of "reception of the evidence" to clarify the meaning. A reference to cases not subject to section 554(d) is deleted as no longer applicable because of earlier amendments. In addition, as in current law it provides that presiding employees shall initially decide all cases unless the agency requires the entire record to be certified to it for decision.

Section 557(b)(2) is amended to specify when presiding employees may be required to recommend a decision, to analyze the record, or to make proposed findings and conclusions. In those portions of expedited proceedings which involve cross-examination, the agency must require the presiding employee to make proposed findings and conclusions concerning such an issue.

Section 557(c) is amended by striking the word "subordinate" each time it appears and inserting "presiding or responsible" in its place. This conforms the language of this subsection with changes in terminology made earlier in the bill.

Section 557(d). The principal amendment made by bill section 214 is the addition of a new subsection (d) to section 557 providing specific authority for the establishment of agency appeal boards and so-called certiorari-type review.

Section 557(d)(1)(A) provides that a review board is composed of one or more members of the agency. In order to avoid unnecessary layers of review, the bill limits the levels of review by the agency to two. Normally, though, there would be no more than one level or review within the agency.

Section 557(d)(1)(B) requires agencies to specify clearly the circumstances and conditions under which an agency will consider appeals from a review board or a presiding employee.

The discretionary review procedure would not affect judicial review in any way. A final decision, whether made by the agency heads, a review board, or a presiding employee, would be judicially reviewable under the same standards and procedures.

Section 557(d)(2) specifies that the provisions of this subsection do not supersede any other provision of law specifically governing a particular agency's ability to create review boards or to delegate a final decision to one or more of its members or other employees. For example, several agencies, such as the Interstate Commerce Commission, the Federal Communications Commission, and the Nuclear Regulatory Commission already have specific authority to create such boards.

Section 215. Ancillary Matters

Section 215 of the bill amends section 558(d) of title 5, United States Code, as redesignated, to make several technical and conforming amendments and to provide for a public file for each on-the-record proceeding.

Section 558(g). The purpose of the new subsection 558(g) is to require each agency to maintain a public file for proceedings conducted pursuant to section 554, and an index to the file. The agency must include in its files motions, briefs, and other legal arguments or pleadings, any action issued by the agency, and any other materials that the agency considers significant. The agency would be expected to make it possible for the public to have ready access to the file and to copy materials in it. Each agency is also encouraged to consider other ways to make the material available to the public. This could include, for example, cooperating with any company that wished to publish it in a series of volumes, opinions or other material from the file.

Some agencies do not now have a public file to assist agency staff or outside parties in preparing legal arguments. The purpose of this section is not to require disclosure of internal agency memoranda or confidential information; rather, the file will enable agency attorneys and outside persons appearing before the agency to determine how agency officials have ruled on similar issues in past proceedings and why. This should in turn make it easier for more persons to participate effectively in agency proceedings. The file will help reduce the length of time participants currently must spend to research and prepare legal precedents established by the agency. It will provide a repository of practical experience which all presiding employees may readily consult when considering what practices and procedures may appropriately be used to assure the most expeditious conduct of the proceedings. This, in turn, should help promote consistency in agency decisions. To be most effective the file and accompanying index should be selective. It should not attempt to reproduce, and should not be confused with, the formal record of any proceeding.

Section 216. Judicial Review

Section 216 is designed to require courts to take a hard look at the validity of an agency's rules.

Section 216(a) amends Section 706 of title 5, United States Code, by providing that a reviewing court shall not accord a presumption of validity to any agency rule when it decides relevant questions of law, interprets constitutional and statutory provisions, or determines the meaning or applicability of the terms of an agency action. This provision does not prevent a court from giving appropriate weight to the expertise developed by an agency in a particular regulatory area.

Section 216(b) provides that Section 216(a) does not, in any civil or criminal action in which such an agency rule is used as a defense, affect any applicable rule of law which accords a presumption of validity to an agency rule or which provides that reliance on an agency rule is a defense.

Section 216(c) amends clause 2(E) Section 706 of the Administrative Procedure Act by requiring courts to hold unlawful and set aside factual determinations (including inferences or projections) made by an agency in informal rulemaking proceedings which are "unsupported by substantial evidence".

This section is not designed to require agencies to prove by substantial evidence every fact, inference or projection which was presented to it. Rather, it is designed to require the agency to prove by substantial evidence the significant facts, projections, and inferences upon which the agency substantially relied in formulating the final rule.

Furthermore, this section is not intended to turn informal rulemaking into formal rulemaking, or to convert the regulatory file established in Section 553(e) into a formal agency "record."

Section 216(d) provides that whenever an agency action is challenged as not authorized by statute, the reviewing court must determine that the agency's statutory jurisdiction or authority has been granted expressly, or, in light of the statute and other relevant legal materials, by clear implication. This section clarifies the obligation of the courts to set aside agency action found to be in excess of statutory jurisdiction, authority or limitations, or short of statutory rights. It is not intended to prevent the courts from using tools of statutory construction in reviewing agency actions that have evolved in the courts as the necessary concomitants of broadly worded delegations to agencies.

The last sentence of this section is intended to ensure that standards of review set forth in this section shall apply whenever an agency rule is challenged in any civil or criminal action not included within the scope of Section 703 of title 5. This sentence is not intended to apply where specific statutory standards govern judicial review of a rule. It does not permit a defendant in an enforcement proceeding to challenge the validity of a rule using the standards of judicial review in this section if the party was afforded a prior adequate opportunity for review of the rule's validity; and it does not permit a person to challenge a rule if he is not authorized to do so under present law.

Section 217. Appearance by Attorney General in Agency Proceedings

Section 217 encourages and authorizes the Attorney General to appear as an intervenor in certain economic regulatory proceedings—and in any action to obtain judicial review of such proceedings—to discuss the effects of an agency's rules or policies on competition and the availability of less anti-competitive alternatives to achieve the agency's statutory goals. The section is not intended to change, modify or repeal any powers which the Attorney General or any other federal official entrusted with the enforcement of the antitrust laws, has under law.

Section 217(a) provides that the Attorney General may appear in four kinds of economic regulatory proceedings in which a federal agency adopts an agency policy or promulgates a rule which directly substitutes government controls for competition by (1) regulating or licensing entry under a scheme in which the level of entry is subject to limitation; (2) setting or reviewing, with authority to accept, reject or modify, the monetary price charged for goods and services; or (4) reviewing, approving, rejecting or regulating the terms and conditions of agreements among providers or purchasers of goods or services. The purpose of such intervention would be to provide the agency with the views of the Attorney General regarding the effects on competition of the policy or rule and the availability of less anti-competitive alternatives.

This section also authorizes the Attorney General to appear in any action for judicial review of any of the rules or policies described in the section.

Section 217(b) provides that each agency, after consultation with the Attorney General and within 120 days after the effective date of the Act, shall establish procedures to notify the Attorney General of pending agency proceedings subject to this section.

Section 218. Venue

Section 218 applies only to actions brought pursuant to the general venue statute, and does not affect any action brought pursuant to special venue standards established by statute.

Section 218(a) amends the general federal venue statute (28 U.S.C. § 1391) (1976) by adding a new subsection (g) which requires a plaintiff in a pending action to alert state attorneys general of the action if it arises in the United States District Court for the District of Columbia and it may be of a "local environmental nature" as defined in new Section 1404(e) of title 28, United States Code. The plaintiff has the responsibility for determining whether the action is of a "local environmental nature" and where the notice, a copy of the complaint, should be sent; the plaintiff is not required to forward a copy of the complaint to more than five states. This section makes it clear that it is only creating a notice requirement and is not limiting or in any other way changing the existing standards governing proper venue. Furthermore, notification of a local attorney general may not be used as an admission that the case is, in fact, "local" for purposes of new Section 1404(e). In operation, this section will place a state's chief legal officer in a position to prepare for a timely application for intervention according to the current rules for intervention (Fed. R. Civ. P. 24), which are unaffected by this section.

Section 218(b)(1) amends 28 U.S.C. 1404(a) (1976) to clarify that any United States district court has the statutory authority to consider the "primarily local or regional impact" of an action as a factor in the court's deliberations on a motion to transfer. Currently, 28 U.S.C. 1404(a) gives the court broad discretion to transfer civil actions "for the convenience of parties and witnesses in the interest of justice." This amendment is intended to codify existing case law which treats "local impact" as an element of the decision to try the case where the interests of justice would best be served. *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 508 (1946). In applying the current transfer section, courts have balanced a multitude of factors in determining if, and where, an action should be transferred. Section 218(b)(1) will spell out that one factor for the court's consideration in determining whether a transfer is justified for the convenience of parties and witnesses and in the interests of justice will be the "primarily local or regional impact" of the action. This will heighten a court's awareness of this important factor without interfering with a court's discretion to weigh all factors presented as it deems proper.

Section 218(b)(2) amends 28 U.S.C. 1404 by adding a new subsection (e) to the general transfer section for district court civil actions. This addition is designed to favor the transfer of certain civil actions to a locally-impacted judicial district without imposing a mandatory requirement for such a transfer. This subsection will apply to civil cases where the cause or causes of action are: (1) brought against the United States pursuant to 28 U.S.C. 1391(e) for which no special venue provision is "otherwise provided by law"; and (2) is of a "local environmental nature." An action is of an environmental nature if (1) it primarily affects local or regional interests in one or more judicial districts other than the district in which the action was filed or if a substantial part of the acts or omissions or of the property which gave rise to the action is located in another district; and (2) if the action arises under any law relating to environmental quality. Although specific items, such as wildlife, water rights and matters pertaining to public lands are listed in the subsection as examples of laws relating to environmental quality, such listing is not meant to limit, but only to clarify the meaning of environmental actions. In making a determination under the new Section 1404(e)(2)(A)(i), a court might consider whether the action will determine, resolve, or significantly affect the substantive rights, benefits, duties or obligations of a substantial number of citizens or interests in a particular area outside of, rather than including, the area of the judicial district where the action is filed. Clause (ii) of this paragraph is drawn directly from subsection (f) of section 1391 which establishes venue guidelines in actions against a foreign state. This language is similar in concept to the language found in current sections 1391(e) (2) and (3), which allows a plaintiff filing pursuant to 28 U.S.C. 1391(e) to file where the cause of action arises or where the real property is located.

The presumption for transfer is not automatic; a motion must be made—as is currently the case—by a party (usually the Department of Justice representing a federal government agency) or a qualified intervenor (*e.g.*, a state attorney general) or the court if so inclined. In the case of an action of a "local environmental nature" filed in the District Court for the District of Columbia, the notice provision of section 218(a) will provide the necesssary notice for a timely application for intervention by an affected state. In cases dealing with local environmental matters, courts have, in fact, transferred such civil actions to the local judicial district upon motion of an intervenor (*National Wildlife Federation* v. *Alexander*, 458 F. Supp. 29 (D.D.C. 1978)). This subsection does not deal with the question of whether intervenors in non-environmental cases may bring a transfer motion.

If the court determines that the action is indeed of a "local environmental nature", it is required to transfer the action to a local and more appropriate judicial district in the absence of a showing by a party that the transfer would result in "substantial hardship or injustice" or is "substantially national rather than local in effect or scope." Thus, the court would be required to balance both sides of the transfer argument with the added guidance and authority of this section.

To determine whether substantial hardship exists, the court would weigh a variety of factors, including the location of witnesses, the location of counsel, the cost of transfer, the financial status of the parties, the need for immediate relief, etc. In determining whether a case was national rather than local in effect or scope, a court would look to both the physical environmental impact of the case, as well as whether questions of national policy are involved. Thus, a court may decide that a case involving a plant situated in one state which generated pollutants creating acid rain over a number of states or regions is national in scope. A party could alternatively show that the case involved the development of a national policy germane to the issue which would benefit from an even and consistent national application.

This section also provides: (1) an action can only be transferred to a district "where it might have been brought" to ensure that a transferee court has jurisdiction to hear the action; and (2) where an action may be transferred to more than one local judicial district, the most appropriate forum should be selected pursuant to the general provisions of 28 U.S.C. 1404(a). In addition, the provision will not require an action to be transferred from a judicial district where the action has a "significant impact" because to do so would be to transfer simply for the sake of transferring. Thus, the requirement for transfer under 28 U.S.C. 1404(e)(1) would not force the court to transfer an action from one "local" judicial district to another "local" judicial district where the impact in the proposed transferor court is significant or where the action is similarly local in both judicial districts.

Section 218(c) amends 28 U.S.C. § 2112(a) to provide an appellate court with the statutory authority to consider as a factor in its transfer motion deliberations the "primarily local or regional impact" of a proceeding. Current Section 2112(a) provides a federal court of appeals with the authority to transfer to any other court of appeals "all the proceedings with respect to such order" upon consideration of the "convenience of the parties in the interest of justice." The addition made by this section parallels the change made to 28 U.S.C. § 1404 in Section 218(b)(1), and it is based on similar rationale. But this change would become operative only within the otherwise prevailing terms of section 2112(a) and will therefore only apply when an appeal is filed in two or more circuits.

Section 219. Conforming Amendment

This section sets forth certain technical changes in section numbers in the Administrative Procedure Act.

PART C—APPOINTMENT AND REASSIGNMENT OF ADMINISTRATIVE LAW JUDGES

Section 221. Appointment and Reassignment of Administrative Law Judges

Section 221 establishes a new chapter 8 in title 5 of the United States Code. Chapter 8 would have the following new provisions:

Chapter 8—Appointment and Evaluation of Administrative Law Judges

Section 801. Definitions

Section 801(1) defines agencies by referring to the definition in section 551(1) of title 5 of the United States Code. Both executive and independent agencies are considered "agencies" under this definition.

Section 801(2) defines administrative law judges as those individuals appointed under section 802 of this title. Individuals who were appointed as administrative law judges under existing section 3105, title 5, United States Code, which section 802 replaces, are also administrative law judges under this definition.

Section 801(3) provides that references to the "Chairman" are references to the Chairman of the Administrative Conference of the United States.

Section 802. Appointment

Section 802(a) provides that administrative law judges (ALJs) are appointed to conduct proceedings as required in section 554 of the bill. Appointment will be as specified in chapter 8 of the bill. Cases will be distributed evenly among ALJs to the greatest degree possible. The duties and responsibilities of ALJs are provided for specifically in chapter 8 and in other provisions of title 5 of the United States Code.

Section 802(b)(1). Chapter 8 makes the Chairman of the Administrative Conference of the United States responsible for recruiting candidates for ALJ positions. The Chairman is encouraged, particularly, to insure that the availability of ALJ positions is made known to eligible individuals who are not employees of the Federal government.

Section 802(b)(2) provides that the Chairman, in consultation with the Office of Personnel Management, will establish qualification requirements for ALJ positions. Having established these requirements, the Chairman will set up and administer a system for examining and selecting ALJs. Those candidates who, after being tested, are found to be qualified for appointment as ALJs are to be ranked in order of their relative qualifications. The purpose of the ranking is to create a list of ALJ candidates in numerical order of their qualifications. Under this legislation the Chairman also has the option of developing, in consultation with the Office of Personnel Management, categories of specialties to be used in ranking ALJ candidates. An example of a specialty would be expertise in Labor Law. Candidates would be ranked in numerical order of their qualifications within such a list.

Section 802(3). When the need for an additional ALJ arises, agencies are to contact the Chairman and request a list of eligible candidates. In response, the Chairman will forward to the agency a list of the ten highest ranking candidates.

Section 802(4). In selecting an ALJ, the agency may choose any one of the ten candidates certified to it by the Chairman but must make its selection from the list.

Section 803. Classification and Pay

Section 803(a) provides that the Chairman will monitor the number of ALJs whose general schedule rank is 16, 17 or 18. The Chairman will revise the maximum number of these individuals from time to time and the total number of these individuals will not be allowed to exceed 350. However, ALJs ranking GS–16, 17 or 18 will not be counted against the maximum numbers of GS–16, 17 and 18 ranked individuals provided for in section 5108 of title 5, United States Code.

Section 803(b) states that the pay of ALJs will be set by the Chairman in compliance with chapters 53 and 51 of title 5, United States Code. The provision states that pay decisions will be made independently of agency recommendations or ratings in order to make it clear that merit pay is expressly excluded from this legislation.

Section 804. Reassignment

Section 804(a) provides that ALJs appointed under this chapter can, at the discretion of the Chairman and as the need arises, be reassigned to other agencies which are understaffed with ALJs. The agency supplying the additional ALJ and the ALJ who is to be transferred must consent.

Section 804(b) amends chapter 21, title 5, United States Code by adding a section entitled, "Section 2101b. Administrative Law Judge Career Service." The effect of this section is to create, for ALJs, a status which is distinct from the Senior Executive Service and any other service.

Section 804(c) amends section 2101(a)(1), title 5, United States Code to exclude ALJ positions from the competitive service.

Section 804(d) amends section 2103, title 5, United States Code by adding the ALJ career service to those services which are not in the excepted service. Sections 804(c) and (d) place ALJs in a position which is unique among employees of the Federal government.

Section 804(e) amends section 2108, title 5, United States Code to exclude ALJ positions from those positions to which the veteran's preference will be applied. Thus, the veteran status of an ALJ candidate will not be taken into account when ranking that individual for ALJ appointment eligibility.

Section 804(f) amends section 7521, title 5, United States Code, bringing that section into conformity with the change in the section under which ALJs are selected.

Section 804(g) makes it clear that ALJs are not included in those persons whose appointment to the excepted service in the executive branch and the government of the District of Columbia is affected by section 3320, title 5, United States Code.

Section 804(h) amends section 3324(a)(1), title 5, United States Code, bringing it into conformity with the changes made by various provisions of this title.

Section 804(i) amends section 4301(2)(D), title 5, United States Code, bringing it into conformity with the changes made by various provisions of this title.

Section 804(j) amends section 1305, title 5, United States Code, bringing it into conformity with the changes made by other provisions of this title.

Section 804(k) repeals sections 3105, 3344, and 5372, title 5, United States Code. These sections have been replaced by sections 802, 803, and 804 of this title.

Section 804(l) brings section 559, title 5, United States Code into synchronization with changes made by this title.

Section 804(m) brings sections 554(a)(2), 4301(2), and 5335(a)(3)(B) into synchronization with changes made by this title.

Section 222. Study of the Independence of the Administrative Law Judge System

Section 222 provides for the establishment of a task force to study the independence of the administrative law judge system. This task force will be composed of the Attorney General, the Chairman of the Administrative Conference of the United States, the Director of the Office of Personnel Management, and two administrative law judges appointed by the President. Within one year after the effective date of this Act, the task force is required to report to the Congress concerning the selection of administrative law judges, the independence of the present administrative law judge system, and the feasibility of establishing an independent corps of administrative law judges.

TITLE III—REVIEW OF THE EFFECTIVENESS OF AND CONTINUING NEED FOR GOVERNMENT REGULATION

Title III establishes a process for Congress and the President to review, over a 12-year period, the policies and statutory mandates of the major federal regulatory agencies. It is designed to help improve the effectiveness of regulatory agencies in achieving their statutory goals.

Section 301. Purposes

Section 301 enumerates the five goals of this title: (1) to provide for a review by the President and Congress of the impact of regulatory policy; (2) to enhance the effectiveness of regulatory agencies; (3) to coordinate regulatory goals with other federal policies; (4) to examine non-regulatory alternatives; and (5) to examine alternatives which will improve productivity.

Section 302. Definitions

Section 302 defines the term "agency" to have the same meaning as in section 552(e) of title 5, United States Code, and provides that the term "Board" refers to the Regulatory Policy Board established in section 602 of title 5 as added by section 102 of this Act.

Section 303. Regulatory Evaluation

Section 303(a) requires the Board to conduct an evaluation of certain agencies according to the schedule established by Section 304 and in light of certain criteria set forth in Section 305. The Board is also required to provide information and advice to the President to assist him in carrying out his responsibilities under this title.

Section 303(b) requires the Board to consult with certain individuals in carrying out its evaluation functions: (1) the Secretary of Labor; (2) the Chairman of the Federal Trade Commission; (3) the Special Assistant to the President for Consumer Affairs; (4) the Administrator of the Small Business Administration; and (5) individuals and groups who are broadly representative of regulated interests, small businesses, labor and consumer interests. The purpose of this provision is to ensure that the Board receives many points of view when conducting the evaluation required by this title.

Section 304. Schedule

Section 304 establishes the review schedule which Congress must follow in evaluating regulatory agencies. The schedule is predicated on sessions of Congress rather than on calendar years. It covers six Congresses, beginning with the 98th Congress and concluding through the 103rd Congress. In the 98th Congress, agencies concerned with energy are reviewed; in the 99th Congress, agencies concerned with environment and natural resources are reviewed; in the 100th Congress, transportation and communications agencies are reviewed; in the 101st Congress, certain health and safety agencies are reviewed; in the 102nd Congress, agencies regulating commerce and international trade are reviewed; and in the 103rd Congress, agencies regulating banking and finance are reviewed.

Section 305. Evaluation and Examination of Agencies

Section 305(a) sets forth the Board's responsibilities in reviewing the regulatory agencies. The Board must propose to the President recommendations concerning the need for reform of each agency scheduled for review together with recommendations for legislation to accomplish such reforms. The recommendations must be submitted by May 1 of the second session of the Congress preceding the Congress in which the evaluation and examination of an agency is scheduled under Section 304.

The section also establishes a framework within which the Committee (and later the President) must conduct the review process and propose legislation. The framework contains five main criteria upon which the recommendations should be based: (1) increasing the effectiveness of regulatory programs; (2) enhancing the ability of health and safety and the interests of consumers; (3) achieving the statutory goals of the agency by less restrictive or non-regulatory means, including the use of taxes, penalties, market-based incentives, bargaining techniques, required disclosure, or the creation of new causes of action; (4) increasing economic competition; and (5) increasing productivity.

Section 305(b) requires the Committee to invite the head of the agency under review to participate in the review and evaluation.

Section 306. Regulatory Reform Bill and Report

Section 306 provides that, by October 1 of the second session of the Congress before the Congress in which an agency is to be reviewed, the President must send to Congress a report and his proposed regulatory reform legislation to achieve the goals established by Section 304. This section is designed to give the Congress sufficient advance notice of the proposed presidential legislation before the start of the succeeding Congress.

Section 307. Procedures for Consideration of Regulatory Reform Bills

Section 307 provides action-forcing procedures to facilitate and expedite congressional consideration of regulatory reform legislation. These procedures are derived from the Impoundment Control Act of 1974 except there are no analagous provisions altering the Senate's filibuster rules. It should be noted that, unlike sunset legislation, there is no "termination" mechanism to prompt congressional regulatory reform legislation. It still takes both Houses of Congress and the President to change the statutory mandate of an agency.

Section 307(a) states, among other things, that the procedures provided in this section are enacted as an exercise of the rulemaking power of the Senate and House respectively, and with full recognition of the power of either House to change the rules at any time.

Section 307(b) provides that the President's regulatory reform bill and report should be referred to the House and Senate Committees with legislative jurisdiction or oversight responsibilities for the subject matter of the bill or report.

Section 307(c) requires a congressional committee which has jurisdiction over a regulatory reform bill to report out a bill and report by

May 15 of the second session of the Congress in which an agency is under review. If two or more committees in either House can agree, they may issue a joint report. If the committee fails to act in a timely fashion, a motion is in order to discharge the committee from further consideration of the President's regulatory reform bill, and may be made only if supported by one-third of the Members of the House involved. The motion is "highly privileged". If a motion to discharge a committee is adopted by a majority of the Members of the House involved, the committee shall be discharged unless, within thirty calendar days after such motion is adopted, the committee reports a regulatory reform bill.

Section 307(d) establishes the procedures for considering the legislation on the floor of the House of Representatives. In particular, the section provides that when a House committee has reported, or has been discharged from further consideration of a regulatory reform bill, it is in order at any time to move to consider the legislation, and the motion is highly privileged and not debatable.

Section 307(e) provides that, except to the extent specifically provided, consideration of the regulatory reform legislation is governed by the general rules of the House of Representatives and the Senate.

TITLE IV—THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Section 401. Organization

Section 401 retains the present structure of the Administrative Conference of the United States (ACUS), to be headed by a Chairman who is appointed by the President and confirmed by the Senate. The Chairman would be appointed to a 4-year term coterminous with the term of the President, but could be retained until a successor is named and appointed at the end of each term. Finally, the Chairman has responsibility for the general administration of the Conference, and is given additional authority in Section 402. Section 401 preserves the ability of the Chairman to select up to 36 members of the Conference from the practicing bar, from academic institutions in the field of administrative law or government, and other knowledgeable individuals. In this group, the section mandates that at least one-fourth be individuals representative of small businesses, consumers and others regularly affected by the regulatory process.

Section 402. Functions of the Conference

Section 402(a) retains the present functions of the Conference and gives the ACUS Chairman a major role in selection and reassignment of administrative law judges (ALJs).

Specifically, the Chairman is authorized to perform the following related functions: selection ALJs for appointment (§ 802), monitor the number of ALJs ranked at general schedule 16, 17 and 18 and prescribe ALJ pay (§ 803), and recommend reassignment of ALJs to insufficiently staffed agencies (§ 804).

Section 402(b) requires the Conference to establish an eleven member in-house Committee on Administrative Procedures to include the Chairman, five employees of federal regulatory agencies or executive departments, and five members not employed by the federal government who are representative of regulated and nonregulated interests.

Once established, the Committee is required to draft and submit to the Conference a set of procedural rules for use in conducting both informal (5 U.S.C. § 553) and on-the-record (5 U.S.C. § § 554–558) proceedings. These rules are to be designed to improve the fairness, quality and efficiency of agency proceedings and would not abridge or modify any procedures established by statute. In drafting the rules, the Committee is instructed to provide public notice and opportunities for oral or written participation by the public.

The procedural rules would require adoption by a majority of the Conference and a review period of 90 days of continuous session of Congress before they could be made binding on agencies. The procedures for congressional review of the rules are derived from the Rules Enabling Act which govern congressional approval of the Federal Rules of Civil Procedure.

TITLE V—MISCELLANEOUS

Section 501. Effective Date

Section 501 provides that the provisions of this Act take place 180 days after enactment of the legislation, except that the President may appoint the Regulatory Policy Board any time after the legislation is enacted. In addition all those agencies which are subject to the Administrative Procedure Act changes in Title II are required to begin promulgating rules within 150 days to comply with those changes.

V. REGULATORY AND PAPERWORK IMPACT STATEMENT

In compliance with paragraph 5 of rule XXIX of the Standing Rules of the Senate, the following is an evaluation of the anticipated regulatory and paperwork impacts of the Reform of Federal Regulations Act, as amended.

1. REGULATORY IMPACT

This legislation does not create any new regulations with which the public must comply, and is targeted solely at the activities of the agencies themselves.

S. 262 will decrease the adverse economic impact of government regulation on individuals, consumers, and businesses and improve the effectiveness of federal agencies in achieving their regulatory goals. It achieves these two goals by requiring agencies, when promulgating a major rule, to examine the economic and non-economic impact of a proposed regulation and to examine alternatives which may accomplish the regulatory goal in a less burdensome way.

2. PAPERWORK IMPACT

S. 262 will decrease the amount of unnecessary paperwork which the public must comply with in two ways. First, it provides a more carefully structured executive oversight body to evaluate conflicting and duplicative paperwork and recordkeeping requirements. Second, the regulatory flexibility analysis section encourages agencies to tailor the size of their paperwork requirements to the size of the business or other small regulated entity.

The legislation will increase the opportunities for the public to comment on paperwork and recordkeeping requirements and increase the responsibility of an agency to explain its regulatory recordkeeping and reporting requirements.

VI. ROLL CALL VOTE AND COMMITTEE ACTION

On May 7, 1980, the Committee voted unanimously, and by voice vote, to report favorably S. 262, the Reform of Federal Regulations Act, as amended, to the floor of the Senate.

VII. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., July 15, 1980.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary, U.S. Senate, 2226 Dirksen Senate Office Building, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has prepared the attached cost estimate for S. 262, the Regulatory Flexibility and Administrative Reform Act of 1980.

Should the committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

CONGRESSIONAL BUDGET OFFICE

COST ESTIMATE

JULY 15, 1980.

1. Bill Number: S. 262.
2. Bill title: Regulatory Flexibility and Administrative Reform Act of 1980.
3. Bill status: As ordered reported by the Senate Committee on the Judiciary, May 7, 1980.
4. Bill purpose: The bill establishes analytical and procedural requirements for the rulemaking activities of federal agencies. It focuses on rules that are expected to significantly affect the economy as a whole; rules that may significantly alter economic competition, employment levels, costs or prices for individual industries, geographic regions, or levels of government; and rules likely to affect many small governmental jurisdictions, small businesses, and other small organizations.

The bill has two separate analytical requirements: first, a regulatory analysis to be conducted by agencies for rulemaking actions that are likely to have significant economic effects; and second, a flexibility analysis for proposed rules that will apply to large numbers of small organizations. Regulatory analysis will focus primarily on the benefits, costs and other effects of proposed rules, while flexibility analysis will cover such issues as the use of performance versus design standards, exemptions from regulatory requirements and different compliance and reporting requirements for certain firms or organizations. In both analyses, agencies must consider alternative means of achieving regulatory objectives.

Agencies will also have to publish annual agendas of their regulatory activities and develop schedules for the review of the major rules in effect at the time of enactment of this bill. Each year, beginning one year after the bill's effective date, an agency will have to review 10 percent but not more than 10 of its major rules in effect at enactment, focusing on the rules' costs and benefits, compliance problems, and overlap with or duplication of other rules. Agencies will also have to review each new major rule within 10 years of its effective date.

The bill establishes a process for oversight of agencies' rulemaking actions by creating a Regulatory Policy Board and assigning monitoring responsibilities to the Congress and the Small Business Administration. Through a series of studies and reports, the Executive Branch will evaluate regulatory agencies' performance and recommend reforms to the Congress. The Congress will review each regulatory agency according to a schedule that begins in fiscal year 1984 during the 98th Congress and ends in fiscal year 1995.

The bill assigns to the Administrative Conference of the United States (ACUS) the responsibility for recruiting administrative law judges (ALJs) and defining a salary structure for them—functions now under the Office of Personnel Management (OPM). ACUS will also head a task force to study the ALJ system and assess the feasibility of an "Independent Corps" of ALJs, and will develop uniform rules for agency rulemaking procedures.

Among its remaining provisions, the bill alters the procedures required of agencies in their informal rulemaking and formal hearings, and it requires that environmental actions" of a local environmental nature" that are brought before federal district courts be heard in the court nearest the locale where the action in question has its greatest effect, unless the action is of national importance or there is risk of "substantial hardship or injustice" to a party in the suit.

5. Cost estimate: Although the bill authorizes appropriations only for the Regulatory Policy Board ($5 million per year for 3 years), its analytical and procedural requirements will result in other costs totalling an estimated $12 to $22 million per year, at 1981 price levels. The major costs come from the required regulatory analysis work, which will add $10 to $20 million to the annual operating expenses of federal regulatory agencies. Appropimately $1 million per year will be required for ACUS' management of the ALJ personnel program and other duties, and for the task force to study the ALJ system. ACUS' costs can be covered by the $2.3 million currently authorized for the conference for each of the fiscal years 1981 and 1982, but the tasks will require new authorizations for the succeeding years. The environmental venue provision may increase the Department of Justice's travel expenses by up to $500,000 annually. Congressional committees will require additional funding for their oversight duties, beginning in fiscal year 1984 and continuing through 1995.

The following table summarizes the costs of various programs of the bill, other than the $10 to $20 million per year for the regulatory analysis work of the federal regulatory agencies.

[By fiscal years, in millions of dollars]

	1981	1982	1983	1984	1985
Regulatory Policy Board:					
Authorization level	5.0	5.0	5.0		
Estimated outlays	4.0	5.0	5.0	1.0	
ACUS:					
Estimated authorization level	1.0	.8	.8	.8	1.0
Estimated outlays	1.0	.8	.8	.8	1.0
Department of Justice:					
Estimated authorization level	.5	.5	.6	.6	.7
Estimated outlays	.5	.5	.6	.6	.7
Congressional committees:					
Estimated authorization level				.8	.6
Estimated outlays				.8	.6
Bill total:					
Estimated authorization level	6.5	6.3	6.4	2.4	2.3
Estimated outlays	5.5	6.3	6.4	3.4	2.3

The costs for this bill fall within budget functions 750 and 800.

6. Basis of estimate:

General regulatory costs.—Currently, several federal agencies include in their rulemaking procedures activities similar to those that S. 262 will require. Executive Order 12044, promulgated in March 1978, furthered the process of reforming federal rulemaking activities by requiring executive agencies to analyze major regulations, conduct departmental oversight of their rulemaking activities, and involve the public in their regulatory work. According to the Office of Management and Budget (OMB), several agencies have responded well to the executive order while a handful have complied only in part. OMB also notes that some agencies had begun to reform and better organize their regulatory activities before EO 12044 was issued.

CBO assumes that S. 262 will become law and replace the executive order, which is scheduled to expire in June 1980, as the basis for reordering agencies' regulatory practices. The bill both requires more of the regulatory agencies and can be expected to elicit greater response from the agencies than has been the case under the executive order. The resulting new activities will therefore entail additional cost to the federal government. For one, the bill applies to both executive agencies and independent agencies whereas EO 12044 applies only to executive agencies. While some of the independent agencies have complied voluntarily with the executive order, the bill will require that all of these agencies pay more attention to regulatory analysis and procedure. The bill also has analytical requirements not covered by the executive order, including analysis of the costs and benefits of major regulations and "flexibility analysis" of all regulations that will have "a significant economic effect on a substantial number of individuals, small businesses, small organizations, or small governmental jurisdictions;" these tasks will require additional expenditures by many agencies. Finally, as a public law, the bill will have a stronger basis for enforcement than does the executive order and should result in more thorough compliance.

CBO estimates that S.262 will require federal agencies as a whole to spend approximately $10 to $20 million more a year to meet its analytical and managerial requirements. These costs are attributable principally to the bill's coverage of independent regulatory agencies, its requirements for analysis of regulatory costs, benefits, flexibility and other factors, and the increased pressure for reform that it will bring to bear on executive agencies. CBO assumes that federal regulatory agencies will annually propose between 100 and 200 reguations requiring regulatory analysis. Approximately half of these will be proposed by the handful of agencies that have complied well with the executive order and that would probably continue their regulatory analysis work even without this bill. S. 262 will require additional analytical work by the remaining regulatory agencies. CBO assumes an average cost of $100,000 per regulation for this work. Additionally, CBO assumes that between 100 and 200 existing major regulations will be reviewed annually at a cost of $50,000 per regulation, and approximately 300 regulations to be proposed each year will require flexibility analysis at a cost of $3,000 apiece.

If its regulatory requirements are implemented effectively, the bill could help resolve regulatory controversies and reduce the legal and other costs associated with such disputes. These cost reductions could partly offset the added costs from the bill's analytical and managerial requirements.

Agency-specific costs.—The bill authorizes annual appropriations of $5 million for a Regulatory Policy Board for fiscal years 1981 through 1983. CBO assumes that the full amounts authorized will be appropriated prior to the beginning of the respective fiscal years. Outlays from these appropriations are estimated on the basis of the historical spending patterns of similar programs. The Board's budgetary effects could be offset somewhat if the regulatory oversight responsibilities of other agencies including those of the U.S. Regulatory Council with its $3 million 1980 appropriation, are transferred to the Board.

CBO estimated the costs for Congressional review of regulatory agencies by ranking the agencies high (2 person-years per committee), medium (1 person-year), or low (½ person-year) in terms of committee staff time required to analyze agency performance and prepare reports and legislation. It was assumed that agency performance will be reviewed by authorizing committees in both Houses of the Congress.

CBO bases its estimate of ACUS' costs on information from ACUS staff and on the Office of Personnel Management's (OPM) current expenses for administering the ALJ personnel program. Approximately $400,000 of the total will be for functions now assigned to OPM. The ALJ task force will require funds for one year only. The remaining costs include start-up expenses for developing the rulemaking guidelines and ongoing staff and overhead expenses to implement, monitor, and improve the guidelines. Combined, the new requirements will cost an estimated $1 million in 1981, and $800,000 in 1982, with increases in subsequent years reflecting anticipated inflation.

The environmental venue provision will result in increased governmental costs in those instances when the United States is a defendant and the Department of Justice incurs increased travel expenses. Based on information from the Department of Justice, these additional costs are estimated to be $7,000 per case. While it is difficult to predict the number of cases that this provision will affect, the Department of Justice's caseload records suggest that not more than 70 cases will be involved annually with additional governmental costs not exceeding $500,000 each year.

According to the Small Business Administration, their Office of the Chief Counsel for Advocacy currently does all the oversight work required of them under the bill's regulatory flexibility provisions. Thus, no additional federal costs will be attributable to these requirements.

7. Estimate comparison: None.

8. Previous CBO estimate: On July 15, 1980, CBO prepared a cost estimate for S. 262, the Reform of Federal Regulation Act of 1979, as ordered reported by the Senate Committee on Governmental Affairs. The Governmental Affairs bill sets analytical and managerial requirements for federal regulatory agencies, as does this bill. It requires more work of the Administative Conference of the U.S. and it assigns oversight responsibilities to the U.S. Regulatory Council and the General Accounting Office, as compared to this bill's creation of a Regulatory Policy Board and assignment of oversight responsibility to the board, the Congress and the Small Business Administration. The Governmental Affairs bill authorizes $70 million over 4 years for public participation grants, which constitutes the major cost difference between the two bills.

Also on July 15, 1980, CBO prepared a cost estimate for S. 299, as ordered reported by the Senate Committee on the Judiciary. S. 299 requires a flexibility analysis of federal regulations, and it is incorporated in its entirety in this bill.

9. Estimate prepared by: Allen Kraus.

10. Estimate approved by:

C. G. Nuckols
(For James L. Blum,
Assistant Director for Budget Analysis).

VIII. ADDITIONAL VIEWS OF SENATOR EDWARD M. KENNEDY, SENATOR HOWARD M. METZENBAUM, AND SENATOR PATRICK J. LEAHY ON THE ENVIRONMENTAL VENUE ACT OF 1980

Section 218 is derived from venue legislation proposed jointly by Senator DeConcini and Senator Laxalt, and is designed to accomplish three objectives. We agree with the first two objectives, but strongly dissent from the third.

1. CODIFICATION OF PRESENT LAW

The first objective of the venue legislation is to codify existing law which allows a court to consider local impact as a factor in deciding a transfer motion. Section 218(b)(1) of the legislation amends 28 U.S.C. § 1404 by specifying that a district court can consider whether an action has a "primarily local or regional impact" when it is determining whether to transfer a civil action to any other district "for the convenience of parties and witnesses and in the interest of justice". Section 218(c) similarly amends 28 U.S.C. § 2112(a) which relates to the transfer of cases in the federal appellate courts.

Numerous courts have, under existing venue law, transferred cases where the controversy is local in nature. In particular, testimony before the Subcommittee on Improvements in Judicial Machinery demonstrated the frequency with which the district courts have transferred environmental and other kinds of suits where "inconvenience" or "local interest" in a case was felt to outweigh the benefits of allowing a plaintiff his choice of a forum. For example, the District Court for the District of Columbia transferred the litigation on the Tennessee-Tombigbee Waterway to the Northern District of Mississippi under 28 U.S.C. § 1404 because it was in the interest of justice, and the District of Columbia was inconvenient for the parties and witnesses. See *Environmental Defense Fund, Inc.* v. *Corps of Engineers of the United States Army*, 348 F. Supp. 916 (N.D. Miss. 1972), affirmed, 492 F. 2d 1123 (5th Cir., 1974) and subsequently litigated as *Environmental Defense Fund, Inc.* v. *Hoffman*, begun in Washington, D.C. (D.D.C. Civil Action 76-2204, November 30, 1976), and transferred to the Northern District of Mississippi sub nom. *Environmental Defense Fund, Inc.* v. *Alexander*, 467 F. Supp. 885 (N.D. Miss. 1979), Affirmed, 614 F. 2d 474 (5th Cir. 1980) (Civil Action 77-53-K). See also *National Preservation Law Center* v. *Landrieu*, (D.D.C. Civil Action 80-0514, April 11, 1980) (NEPA case transferred to South Carolina because, among other things, the project under review was located in the other forum); *National Wildlife Federation* v. *Andrus*, Civil Action No. 78-2090 (D.D.C. 1979) (case transferred to State of Washington); *National Wildlife Federation* v. *Alexander*, 485 F. Supp.

29 (D.D.C. 1978) (case transferred to South Carolina where the port terminal in dispute was located); *Southern California Ass'n. of Governments* v. *Kleppe*, 413 F. Supp. 563 (D.D.C. 1976) (challenge to oil and gas leasing transferred to California because California law was significantly involved and "there was no national policy issue" militating against transfer).

As William A. Butler, the General Counsel of the Environmental Defense Fund, testified before the Subcommittee on Improvements in Judicial Machinery:

> * * * (T)he venue provision in 28 U.S.C. §1404 already provides the federal judiciary with the flexibility needed to accommodate a wide variety of cases and situations, and * * * the District of Columbia Courts have been sensitive to the needs of litigants and (have) used that provision to transfer cases to the district which is most convenient.

We agree with the assessment that the courts already have the flexibility to consider local impact when determining whether to transfer cases to other district courts under the venue laws. Nonetheless, we have no objection, and indeed support, this provision which codifies existing case law and thereby heightens the courts' sensitivity to local impact in venue cases.

2. NOTIFICATION

The second objective is to improve the procedures for ensuring that states which are affected by an environmental action will have adequate and timely notice that the case has been brought in another judicial district. This section provides that whenever an action arguably of a local environmental nature is brought in the United States District Court for the District of Columbia, the plaintiff must forward a copy of his complaint to the attorneys general of up to five states affected by the suit.

We agree with the objective of this notification provision. The testimony before the Subcommittee indicated that, in many of the venue cases which the supporters of this legislation claim as illustrations of the failure of the courts to give adequate consideration to local impact, there were no motions to transfer the case. This notification provision will ensure that affected persons will have a better opportunity to intervene in a timely fashion to bring a motion to transfer.

3. PRESUMPTION IN ENVIRONMENTAL CASES

The third objective of the section is to create a presumption, in Section 218(b)(2), that courts must transfer a local environmental case to another judicial district when the action primarily affects local or regional interests in that district, unless there is a substantial hardship or injustice, or the impact of the action is substantially national rather then local in effect or scope.

We recommend that the Senate reject this provision as both unnecessary and unwise. The proponents of this provision have failed to show that there are any inadequacies with the existing venue transfer mechanism; that the proposed amendments will result in any improvements to current venue law; and that the proposed amendment will not create much unnecessary litigation and serious administrative problems for the courts.

When S. 1472, the predecessor of this section, was first introduced last year, we were deeply concerned about the provision which would require that environmental cases originate in the court of the district where a "substantial portion" of the environmental "impact or injury" occurred, if the impact or injury was less than nationwide in scope. The primary goal of this legislation was to discourage environmental cases from being litigated in Washington, D.C.

Certainly, as we discussed at length above, we agree with the Majority that a court should be able to consider the local effects of a case in determining where the case is most appropriately tried. Nothing in the record, however, justifies elevating this particular concern above other factors, some of them crucial to the rights of parties, witnesses and intervenors, currently considered in reaching venue decisions. Moreover, we believe that the Washington, D.C. courts often provide the forum best equipped to deal with environmental questions with nationwide ramifications. In the acid rain situation, for example, a coal burning plant in one state can pollute the lakes and streams of many other states and nations. Since there is no logical reason for these cases to be brought in any one particular location, it is certainly not inappropriate to have the major policy issues resolved in a nationally-oriented forum, the District of Columbia. The courts in the District of Columbia were designed to handle precisely this kind of nationwide problem.

The provision which was reported out of this Committee has been modified to respond to our concern about environmental cases which involve national policy questions. Nonetheless, this venue provision creates a host of problems without accomplishing any noticeable gains.

First, we should point out that nothing in the hearing record justifies a departure from the present venue laws. Existing law already permits courts to transfer cases to judicial districts more immediately affected by a controversy, as the Majority concedes and as we pointed out above. Moreover, statistics presented at the Subcommittee hearings cogently demonstrate that the vast majority of National Environmental Policy Act lawsuits are presently tried in judicial districts where the injury occurs—and not in the District of Columbia.

At the hearing, the United States Department of Justice testified that, of 649 environmental cases currently pending in the Civil Division, only 25 (approximately 4%) were brought in Washington. Cases brought to enforce compliance with NEPA constitute the largest category (over half) of pending environmental actions against the government. The Council on Environmental Quality prepared a detailed review spanning eight years of NEPA litigation. (See appendix A) Their review demonstrates that the present venue provisions are generally working well:

> The Council disagrees with the premise underlying the need for . . . [this section]. The council, which has oversight responsibility for the National Environmental Policy Act (NEPA), maintains a computerized file of all NEPA lawsuits (NEPALIT). A careful review of the NEPALIT file dis-

> closes that the vast majority of NEPA lawsuits are presently tried in judicial districts where the injury or impact occurs and not in the District of Columbia.
>
> This conclusion is based on an analysis of 950 NEPA lawsuits brought during the 8-year period January, 1970, through December 31, 1977. During that period 131 NEPA lawsuits (or 13.7 percent of the total) were brought in the District of Columbia. Enclosed is a more detailed breakdown of the types of NEPA lawsuits brought in the District of Columbia. These figures demonstrate that 45 cases, or less than 5 percent of all NEPA lawsuits filed, involve issues or impacts occurring in localities outside or unrelated to the District of Columbia, where the provisions of * * * (this section) might arguably have resulted in a different venue. Significantly the figures indicate that the plaintiffs in these 45 cases are not all environmental groups, but include a significant number of state and local government and business plaintiffs as well, suggesting that in selected cases there may be special circumstances justifying the bringing of NEPA lawsuits in the District of Columbia rather than in the judicial district where the impacts occur. It is apparent, in any event, that with respect to NEPA litigation the vast majority of cases are brought in the judicial district where the issues arise or impacts occur consistent with the goals of [this section].[37]

In short, while the proponents of this section may have perceived a problem with current venue law, the hearing record fails to substantiate the need for a presumption in environmental cases.

Second, it is highly unlikely that this venue provision will have much impact on the kinds of cases which the supporters of this legislation cite to support the presumption. The witnesses at the Subcommittee hearings cited several cases to illustrate how current venue law may be inadequate. Yet most of these cases involved issues of national, rather than local dimension. For example, *Sierra Club* v. *Andrus*, 487 F. Supp. 443 (D.D.C. 1980) sought to compel the federal government to assert its water rights in order to protect national park and recreation areas used by citizens of every state, including the Grand Canyon National Recreation Area.

Only a few of the cited cases, for example, *Defenders of Wildlife* v. *Andrus*, 455 F. Supp. 446 (D.D.C. 1978) and *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973) were cases which were brought in the District of Columbia and which could arguably be described as "primarily local or regional" in impact. In view of the many thousands of litigated environmental cases in the past decade, the majority's ability to produce only a few cases which arguably were improperly filed is a slim reed indeed upon which to ask Congress to legislate.

While the proponents have thus failed to show any real need for legislation, the bill they have produced raises a host of unresolved questions: What is an "environmental" action? When is an action

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[37] Letter dated Feb. 23, 1980 from Chairman Gus Speth to Senator Dennis DeConcini.

"primarily local or regional" rather than "national" in effect or scope? How is a court to decide—or is it to decide—which of several affected jurisdictions is the most appropriate forum to decide a controversy? Answering these questions will unnecessarily complicate environmental litigation, leading to increased costs, delay, and court congestion.

The Justice Department had "significant" objections to the Committee's bill and urged that it not be adopted.[38] Among the concerns the Department cited were:

(*a*) The bill applies solely to "environmental" actions although the term "environmental" is not defined. This language may create definitional problems and needless litigation.

(*b*) The bill fails to define a "local" action, depriving the courts of guidance in administering the new venue provisions.

(*c*) The bill would require a court to consider transfer on its own motion, adding unnecessarily to the cost of litigation.

The objections of the Justice Department are well taken. These venue provisions will, in the guise of protecting local interests, merely confuse courts and litigants, hindering the operation of an already overburdened judicial system.

APPENDIX A

NEPA LAWSUITS AND VENUE

(January, 1970–December 31, 1977)

Total NEPA lawsuits—950.

Total NEPA lawsuits in District of Columbia District Court—131 (13.7 percent of total).

BREAKDOWN OF NEPA LAWSUITS BROUGHT IN DISTRICT OF COLUMBIA DISTRICT COURT

Thirty-nine cases (4.1 percent) involving rulemaking, regulatory standards and other programs of nationwide application.

Twenty-nine cases (3.0 percent) involving federal actions or projects where the injury or impacts occur within the District of Columbia or in areas nearby the District.

Eight cases (0.9 percent) filed in the District of Columbia which were later transferred to the judicial district in the locality principally affected (or resolved on the basis of cases pending or decided in other judicial districts).

Six cases (0.6 percent) involving environmental issues affecting a number of different states or a large region of the United States.

Four cases (0.4 percent) involving federal actions outside the United States.

Forty-five cases (4.7 percent) involving environmental issues or impacts occurring in localities outside and arguably unrelated to the District of Columbia.

Total—131 (13.7 percent).

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[38] Letter dated May 29, 1980 from Assistant Attorney General James Moorman to Senator Dennis DeConcini.

Breakdown by type of plaintiff of 45 NEPA cases brought in District of Columbia that could have been brought in judicial district principally affected

Type of Plaintiff	*Number of cases*
Citizens/environmental groups	25
Business/industry	9
State and local government	9
Union/employees	2
Total	45

Source: Council on Environmental Quality.

IX. CHANGES IN EXISTING LAW

In compliance with subsection (4) of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows: Existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman.

UNITED STATES CODE

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I—THE AGENCIES GENERALLY

Chapter	Sec.
1—Organization	101
3—Powers	301
5—Administrative Procedure	501
6—The Management, Planning, and Analysis of Regulatory Functions	*601*
7—Judicial Review	701
8—Appointment and Reassignment of Administrative Law Judges	*801*
9—Executive Reorganization	901

CHAPTER 5—ADMINISTRATIVE PROCEDURE

SUBCHAPTER I—GENERAL PROVISIONS

Sec.
500. Administrative practice; general provisions.
501. Advertising practice; restrictions.
502. Administrative practice; Reserves and National Guardsmen.
503. Witness fees and allowances.

SUBCHAPTER II—ADMINISTRATIVE PROCEDURE

551. Definitions.
552. Public information; agency rules, opinions, orders, records, and proceedings.
552a. Records about individuals.
552b. Open meetings.
553. Rule making.
554. [Adjudications.] *Proceedings on the record.*
555. [Ancillary matters.] *General hearing process.*
556. [Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.] *Formal hearings; powers and duties of presiding employees; evidence.*
557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.
558. Ancillary matters.
[558.] *559.* Imposition of sanctions; determination of applications for licenses; supension, revocation, and expiration of licenses.
[559.] *560.* Effect on other laws; effect of subsequent statute.

CHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

571. Purpose.
572. Definitions.
573. Administrative Conference of the United States.
574. Powers and duties of the Conference.
575. Organization of the Conference.
576. Appropriations.

* * * * * * *

Sec. 553. Rule making

(a) [This section applies,] *(1) Subsections (b) through (e) of this section apply*, according to the provisions thereof, except to the extent that *notice and hearing is not required by statute and that* there is involved—

[(1)] *(A)* a military or foreign affairs function of the United States; [or]

[(2)] *(B)* a matter relating to agency [management or] *management, organization or* [personnel to public property, loans, grants, benefits or contracts] *personnel, or rules of agency practice or procedure;*

(C) matters relating to—

(i) the acquisition by the Federal Government by contract of real or personal property or services, through purchase, lease, or barter, which is promulgated in compliance with criteria and procedures established by the Administrator for Federal Procurement Policy;

(ii) the disposal by contract of sale of surplus and personal property of the United States, which is promulgated in compliance with criteria and procedures established by the Administrator of General Services; and

(iii) public property or contracts of a wholly owned Government corporation;

(D) a rule which the agency for good cause finds—

(i) involves a matter for which notice and public procedure is impracticable, unnecessary, or contrary to the public interest; or

(ii) is being adopted in response to an emergency situation or is governed by short term statutory or judicial deadlines which make compliance with the provisions of this section impracticable;

(E) an interpretative rule; or

(F) a general statement of policy.

(2) In the case of a rule for which an agency makes a finding under clause (D) of paragraph (1) of this subsection, the agency shall—

(A) publish the rule in the Federal Register with a statement of the finding of the agency under such paragraph and the reasons therefor; and

(B) comply with the provisions of this subchapter, whenever appropriate, after the publication of the rule.

(b) General notice of proposed rule making shall be published in the Federal Register, unless [persons subject thereto] *all persons substantially interested in the matter* are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

[(1) a statement of the time, place, and nature of public rule making proceedings;]

[(2) reference to the legal authority under which the rule is proposed; and]

[(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.]

(1) the terms or substance of the proposed rule or a description of the subjects and issues involved;

(2) a statement of the time, place and nature of public rule making proceedings;

(3) a discussion of the legal basis of the proposed rule; and

(4) with regard to any reporting or recordkeeping requirement which the agency anticipates will occur as a result of the proposed rule—

(A) a statement of the purpose of the requirement and a description of its form, its length, and the type of professional skills necessary for preparation of the report or record;

(B) an estimate of the classes of persons who will be subject to the requirement and, to the extent practicable, the number of persons who will be required to submit or maintain the reports or records; and

(C) an estimate of the time required to complete such reports or records.

[Except when notice or hearing is required by statute, this subsection does not apply

[(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

[(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary or contrary to the public interest.]

(c)*(1)* After *the* notice required by *subsection (b) of* this section, the agency shall give interested persons an opportunity to participate in the rule making through submissions of written data, views, or arguments, with or without opportunity for oral presentation. [After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.]

(2) When rules are required by statute to be made on the record after opportunity for an agency hearing, [sections 556 and 557 of this title apply] *section 554 of this title applies* instead of this subsection.

[(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

[(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

[(2) interpretative rules and statements of policy; or

[(3) as otherwise provided by the agency for good cause found and published with the rule.]

(d)(1) After consideration of the relevant matter presented, the agency shall incorporate in the final rule adopted a concise general statement of the basis and purpose of the rule. The statement shall include a response to the significant issues raised by the comments received by the agency concerning the proposed rule and by the comments received by the agency upon any significant alternatives which were considered by the agency.

(2) Except in the case of a substantive rule which grants or recognizes an exemption or relieves a restriction and unless a longer period of time is required by law or provided in the rule or if the agency for good cause determines otherwise, the agency shall, not less than 30 days before the effective date of the final rule, publish the final rule in the Federal Register unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law.

(e)(1) Not later than the date on which the agency publishes general notice of proposed rule making for a rule under subsection (b) of this

section, the agency shall establish a file for each rule making proceeding conducted pursuant to this section. Except as provided in paragraph (2) of this subsection, the file shall include—

(A) the notice of proposed rule making and any supplemental notice;

(B) copies of, or identification of, all studies and documentary material upon which the agency substantially relied in formulating the proposed or final rule;

(C) copies of all written comments received from the public on the proposed rule or area of inquiry after the notice or advance notice of proposed rule making was published in the Federal Register;

(D) all material which the agency, pursuant to any statute authorizing the promulgation of the rule, is required to make public in connection with the rule making or which the agency determines to make part of the record;

(E) any statement, description, or analysis required to be prepared by the agency in formulating the rule; and

(F) if required by law, any record of outside communication.

(2) The file required by paragraph (1) of this subsection is not required to include any material which is exempt from public disclosure under section 552(b) of this title if the agency includes in such file a statement which notes the existence of such material and the basis upon which such material is exempt from public disclosure under such section.

[(e)**]** *(f)* Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

"§ 554. **[Adjudications]** ***Proceedings on the record***

(a)*(1)* This section applies, according to the provisions thereof, **[**in every case of adjudication**]** *to all adjudication and rule making proceedings* required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

[(1)**]** *(A)* a matter subject to a subsequent trial of the law and the facts de novo in a court;

[(2)**]** *(B)* the selection or tenure of an employee, except an administrative law judge appointed under section **[**3105**]** *802* of this title;

[(3)**]** *(C)* proceedings in which decisions rest solely on inspections, tests, or elections;

[(4)**]** *(D)* the conduct of military or foreign affairs functions;

[(5)**]** *(E)* cases in which an agency is acting as an agent for a court; or

[(6)**]** *(F)* the certification of worker representatives.

(2) Hearings held for adjudication and rule making proceedings subject to the provisions of paragraph (1) of this subsection shall be conducted in accordance with the provisions of subsections (b) through (d) of this section and section 555 or 556 of this title, as the case may be, except in any case in which a statute establishes a different procedure.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearing;

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the [moving parties,] *parties initiating the proceeding,* other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

[(c) The agency shall give all interested parties opportunity for—

[(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

[(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.]

(c)(1)(A) There shall preside at hearings conducted pursuant to this section or sections 555, 556, and 557 of this title—

(i) the agency;

(ii) one or more members of the body which comprises the agency; or

(iii) one or more administrative law judges appointed under section 802 of this title.

Nothing in this subchapter shall supersede the manner in which specified classes of proceedings are conducted, in whole or in part, by or before boards or other employees specifically provided by, or designated under, statute.

(B) The presiding employee at a hearing conducted under this section shall comply with the requirements of section 557 of this title unless he becomes unavailable to the agency. If the presiding employee becomes unavailable to the agency, the agency may designate another employee qualified to preside at hearings under this section to discharge the functions of the unavailable employee.

(C)(i) The functions of presiding employees, or of employees assisting or otherwise advising the presiding employee under section 555 of this title, and of employees participating in decisions in accordance with section 557 of this title, shall be conducted in an impartial manner. Any such employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of any such employee, the agency shall determine the matter as a part of the record and decision in the case. The presiding employee may not be responsible to or subject to the supervision or direction of any employee or agent actively participating in the performance of investigative or litigating functions for the agency, including any employee or agent actively participating in a case on behalf of the agency, except that this sentence does not apply to the agency or a member or members of the body comprising the agency.

(2) Subject to published rules of the agency and within its powers, employees presiding at hearings conducted under this section may—

[(1)] *(A)* administer oaths and affirmations;

[(2)] *(B)* issue subpenas authorized by law;

[(3) rule on offers of proof and receive relevant evidence;]

[(4)] *(C)* take depositions or have depositions taken when the ends of justice would be served;

[(5)] *(D)* regulate the course of the hearing;

[(6)] *(E)* hold conferences for the settlement or simplification of the issues [by consent of the] *upon the initiative of the presiding employee or at the request of the* parties;

[(7)] *(F)* dispose of procedural requests or similar matters;

(G) ask such questions, or conduct such cross-examination, as the presiding employee believes are appropriate;

[(8)] *(H)* make or recommend decisions *or findings* in accordance with section 557 of this title; [and]

(I) request the agency to consider and act on interlocutory appeals when agency action on such appeals would help expedite final agency action; and

[(9)] *(J)* take other action authorized by agency rule consistent with this subchapter.

(3) In carrying out his responsibilities under this subsection, the presiding employee shall act to—

(A) assure that discovery, to the extent provided by other provisions of law or agency rules, and all other prehearing and hearing stages of the proceeding, are completed in a manner which is expeditious and which is consistent with statutes applicable to the agency and rules promulgated by the agency to implement such statutes;

(B) provide a record of the proceeding which is not unduly repetitious and which contains in a concise form only matters that are relevant and material to a decision in the case;

(C) establish, if appropriate, deadlines for the completion of the hearing and any other portion of the proceeding, except that any such deadline shall be consistent with the deadlines established by the agency pursuant to section 612 of this title;

(D) rule on questions of fact or law in such a manner as to define the issue involved in as narrow and specific a manner as possible; and

(E) take any other appropriate action authorized by this subchapter or any other applicable law designed to assure prompt disposition of the matter.

[(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

[(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

[(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

[(A) in determining applications for initial licenses;

[(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

[(C) to the agency or a member or members of the body comprising the agency.

(d)(1) Except to the extent required for the disposition of ex parte matters as authorized by law, neither the employee who presides over a proceeding conducted in accordance with this section or who assists or otherwise advises the presiding employee pursuant to section 555(d) of this title, nor any responsible employee of the agency may consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate, except that in rule making and initial licensing proceedings, such employee or member may, on his initiative, consult agency employees other than those described in paragraph (2) of this subsection for assistance in evaluating the record of and understanding the issues in the proceeding.

(2) An employee or agent actively participating in the performance of investigative or litigating functions for an agency, including an employee or agent actively participating in presenting a case on behalf of the agency, may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review of the decision pursuant to section 557 of this title, except as witness or counsel in public proceedings.

(3) This subsection does not apply to the agency or a member or members of the body comprising the agency.

(4) For purposes of this subsection, the term "litigating function" does not include participation in a judicial proceeding concerning an agency action.

[(*e*) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.]

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding conducted under this section constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material act appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. A sanction may not be imposed or rule or order issued except on consideration of the whole record or the parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence.

§ 555. Ancillary matters

[(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

[(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

[(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

[(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

[(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.**]**

§ 555. General hearing process

(a)(1) An agency may, in its discretion, apply this section to any agency proceeding subject to section 554 of this title which predominantly concerns policy issues of a general character, including ratemaking, rulemaking, and initial licensing proceedings, rather than a proceeding which predominantly concerns specific factual questions requiring trial-type procedures for their resolution, except that this section shall not apply to any proceeding to—

(A) impose civil penalties or fines or to establish that a culpable violation of law has been committed by any person; or

(B) determine the claims of any individual for benefits relating to his physical or mental condition, age, employment status, or status as a dependent, survivor, or relative of another person.

(2) Within 150 days after the effective date of this chapter, and at such times thereafter as the agency may deem appropriate, each agency shall issue a rule (A) designating the categories of proceedings to which the provisions of this section shall apply, and (B) governing the manner in which proceedings subject to this section shall be conducted.

(b) In the case of any proceeding conducted under this section, each agency shall require the party initiating the proceeding, including the agency, to submit in written form at the time the proceeding is initiated all the facts and arguments upon which such party initially proposes to rely that are known at such time to such party, unless the agency finds that the submission of such facts and arguments will unduly delay the proceeding or materially prejudice the rights of any party. In any proceeding conducted under this section, the agency shall conduct a hearing

to afford parties an opportunity to submit for the record such written data, views, or arguments and such responses to the data, views, or arguments submitted by other parties, as the agency or the presiding employee may specify. At the request of any party in the proceeding, the hearing shall include an opportunity for oral argument with respect to such written submissions. To the extent authorized by section 558 of this title or other law, the hearing shall be preceded by such discovery procedures as the agency or presiding employee determines appropriate.

(c)(1) At the conclusion of any hearing or an applicable portion of any hearing conducted under subsection (b) of this section, the presiding employee shall designate a disputed question for resolution in a formal hearing conducted under section 556(d) of this title if he determines—

(A) such question consists of a genuine and substantial dispute of fact which only can be resolved with sufficient accuracy by the introduction of reliable evidence at a formal hearing; and

(B) the decision of the agency in the case is likely to depend in whole or in part on the resolution of such question.

(2) In making a determination under paragraph (1) of this subsection, the presiding employee shall designate in writing the specific facts which are in genuine and substantial dispute, and the reason why the decision of the agency is likely to depend on the resolution of such facts. Upon review no court shall hold unlawful or set aside any agency action, finding, or conclusion on the basis of any choice of procedures made by the agency under this subsection, unless such choice was an abuse of discretion which substantially prejudiced the rights of the parties.

(d) For the purposes of any proceeding conducted under this section, the agency may designate one or more employees to assist the presiding employee by questioning parties at an oral hearing, or by otherwise advising the presiding employee. No employee designated under this subsection shall have any authority to issue any findings, decisions, or other orders in the proceeding.

§ 556. [Hearings: presiding employees; powers and duties; burden of proof; evidence; record as basis of decision] ***Formal hearings; powers and duties of presiding employees; evidence***

(a) [This section applies, according the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.] *This section applies to all proceedings subject to section 554 of this title except proceedings or portions of proceedings conducted pursuant to section 555 of this title.*

(b) There shall preside at the taking of evidence—

[(1) the agency;

[(2) one or more members of the body which comprises the agency; or

[(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

[(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

[(1) administer oaths and affirmations;

[(2) issue subpenas authorized by law;

[(3) rule on offers of proof and receive relevant evidence;

[(4) take depositions or have depositions taken when the ends of justice would be served;

[(5) regulate the course of the hearing;

[(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

[(7) dispose of procedural requests or similar matters;

[(8) make or recommend decisions in accordance with section 557 of this title; and

[(9) take other action authorized by agency rule consistent with this subchapter.]

(b) The agency shall give all interested parties opportunity for the submission and consideration of facts, arguments, offers of settlement, of proposals of adjustment when time, the nature of the proceeding, and the public interest permit.

(c) To the extent that the parties are unable so to determine a controversy by consent, the agency shall conduct a formal hearing on notice and in accordance with this section and section 557 of this title.

(d) [Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.] A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of facts. [In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.] *Subject to published rules of the agency and within its powers, presiding employees at formal hearings may—*

(1) rule on offers of proof and receive relevant evidence;

(2) adopt procedures for the submission of all or part of direct testimony in written form, if oral presentation of direct testimony is not required for a full and true disclosure of relevant evidentiary

facts, and a denial of the opportunity to present such testimony orally would not materially prejudice any party; and

(3) upon the motion of any party, issue a decision prior to the completion of the hearing on the whole or a part of the proceeding if there is no genuine and substantial dispute as to any material fact and the moving party is entitled to a judgment as a matter of law.

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted [in accordance with section 556] *under section 554* of this title.

(b) [When] *(1) If* the agency did not preside at the [reception of the evidence,] *hearing,* the presiding [employee, or, in cases not subject to section 554(d) of this title,] *employee shall initially decide the case* unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. [When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

[(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

[(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.]

(2) Where the entire record has been certified to the agency for decision pursuant to paragraph (1) of this subsection, the presiding employee shall recommend a decision before certifying the record to the agency in cases conducted under section 556 of this title. In any proceeding conducted pursuant to section 555 of this title, the agency may require the presiding employee to certify the record to it with a recommended decision, or without a recommended decision but with such analysis of the record as the agency may specify except that in the case of any disputed question designated under subsection (c) of such section for resolution in a formal hearing conducted under section 556(d) of this title, the agency shall require the presiding employee to make proposed findings and conclusions concerning such question.

(3) Whenever the presiding employee submits the record without an initial or recommended decision, the agency shall issue a tentative decision or shall designate one of its responsible employees to recommend a decision.

(4) This subsection does not apply in any case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably requires a decision to be made in a proceeding without an initial, tentative, or recommended decision.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of [subordinate] *presiding or responsible* employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees particcipating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decision or recommended decisions of [subordinate] *presiding or responsible* employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(d)(1)(A) Each agency may establish by rule one or more boards to review decisions of presiding employees in accordance with the provisions of this section, except that no agency may subject any decision of the presiding employee to more than two different levels of review, including any review conducted by the agency en banc. Each board authorized by this subsection shall be composed of one or more members of the body comprising the agency. Subject to paragraph (B) of this subsection, any agency may provide by rule that—

(i) any decision or any category of decisions by the presiding employee shall become final unless reviewed by a board or by the agency en banc; and

(ii) any decision or any category of decisions made by a board on review shall become final unless reviewed by the agency en banc.

(B) Each agency shall specify by rule the circumstances and conditions, if any, under which the agency will entertain and consider appeals from the decision of the board or presiding employee. Such rule shall also specify the circumstances and conditions under which the agency shall exclude from the jurisdiction of the board responsibility for reviewing a decision or category of decisions

(2) Nothing in this subsection shall be construed to supersede—

(A) any provision of law specifically governing the composition and organization of any employee board of a particular agency or the right of any agency members of a particular agency to direct review of decisions, or

(B) any other authority of an agency to delegate the final decision to any agency members or other employees.

[d]*(e)*(1) In any agency proceeding which is subject to [subsection (a) of this section,] *section 552*, except to the extent required for the disposition of ex parte matters as authorized by law—

(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the *proceeding or any factually related* proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the mertis of the proceeding;

(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

(i) all such written communications;

(ii) memoranda stating the substance of all such oral communications; and

(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

(2) The agency may, to the extent consistent with the interest of justice and the policy of the underlying statutes administered by the agency, consider a violation of **[**section 557 (d) of this title**]** *this subsection* sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.

[(2)**]**(*3*) This subsection does not constitute authority to withhold information from Congress.

§ 558. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear

before an agency or its presiding or responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in proceeding, whether interlocutory, summary, or otherwise, or in connection with any agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceeding. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial.

(f) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

(g) Each agency shall compile and maintain a file which contains significant material from the record of public proceedings conducted under section 554 of this title which are likely to be of particular interest to the agency or other persons participating in subsequent agency proceedings, together with a detailed subject matter index to such file. The agency shall include in such file any motions, briefs, and other legal arguments or pleadings relating to each such proceeding filed with the agency by any party, and any action issued by the agency in connection with any such filing. In the case of a rule making proceeding, the agency shall include in the file required by this subsection the file required by section 553(e) of this title. The agency shall make the file and index required by this subsection readily accessible to the public, and shall take any additional steps the agency determines appropriate to provide for the dissemination of such material to interested members of the public.

§ [588.] *559.* Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with **[**sections 556 and 557**]** *section 554*, of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

* * * * * * *

§ [559.] *560.* Effect on other laws; effect of subsequent statute

This subchapter, chapter 7, and sections 1305, **[**3105, 3344,**]** *802*, *804*, 4301(2)(E), **[**5372,**]** *803*, and 7521 of this title, and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, **[**3105, 3344,**]** *802*, *804*, 4301(2)(E), 5372, or **[**7521**]** *803* of this title, or the provisions of section 5335(a)(B) of this title that relate to administrative law judges, except to the extent that it does so expressly.

SUBCHAPTER III—ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

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§ 573. Administrative Conference of the United States

(a) The Administrative Conference of the United States shall be headed by a Chairman appointed by the President, by and with the advice and consent of the Senate. The Chairman shall be appointed for a term of 4 years which shall be coterminous with the term of the President, except that any person serving as Chairman whose term has expired may serve until his successor is appointed and confirmed. The Chairman is authorized to appoint, subject to the provisions of this title, such officers and employees as may be necessary to administer the provisions of this subchapter, and to prescribe the powers, duties, and responsibilities of such officers and employees. The Chairman shall be compensated at the rate provided established for level III of the Executive Schedule under section 5314 of this title.

[(a)**]** *(b)* The Administrative Conference of the United States consists of not more than 91 nor less than 75 members appointed as set forth in subsection **[**(b)**]** *(c)* of this section.

[(b)] (*c*) The Conference is composed of—

(1) [a full-time Chairman appointed for a 5-year term by the President, by and with the advice and consent of the Senate. The Chairman is entitled to pay at the highest rate established by statute for the chairman of an independent regulatory board or commission, and may continue to serve until his successor is appointed and has qualified;] *the Chairman of the Conference;*

(2) the chairman of each independent regulatory board or commission or an individual designated by the board or commission;

(3) the head of each Executive department or other administrative agency which is designated by the President, or an individual designated by the head of the department or agency;

(4) when authorized by the Council referred to in section 575 (b) of this title, one or more appointees from a board, commission, department, or agency referred to in this subsection, designated by the head thereof with, in the case of a board or commission, the approval of the board or commission;

(5) individuals appointed by the President to membership on the Council who are not otherwise members of the Conference; and

(6) not more than 36 other members appointed by the Chairman, with the approval of the Council, for terms of 2 years, except that the number of members appointed by the Chairman may at no time be less than one-third nor more than two-fifths of the total number of members. The Chairman shall select the members in a manner which will provide broad representation of the views of private citizens and utilize diverse experience. The members shall be members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure. *At least one-fourth of the members appointed by the Chairman shall be individuals who shall be broadly representative of regulated interests, small business and consumer interests.*

[(c)] (*d*) Members of the Conference, except the Chairman, are not entitled to pay for services. Members appointed from outside the Federal Government are entitled to travel expenses, including per diem instead of subsistence, as authorized by section 5703 of this title for individuals serving without pay.

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§ 575. Organization of the Conference

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(c) The Chairman is the chief executive *and administrative officer* of the Conference. In that capacity he has the power to—

* * * * * * *

(14) on request of the head of an agency, furnish assistance and advice on matters of administrative procedure; [and]

(15) exercise such additional authority as the Council or Assembly delegates to [him.] *him; and*

(16) provide for the selection and reassignment of administrative law judges in accordance with sections 802, 803, and 804 of this title.

The Chairman shall preside at meetings of the Council and at each plenary session of the Conference, to which he shall make a full report concerning the affairs of the Conference since the last preceding plenary session. The Chairman, on behalf of the Conference, shall transmit to the President and Congress an annual report and such interim reports as he considers desirable.

(d)(1)(A) The Conference shall establish a Committee on Administrative Procedures which shall be composed of—

(i) the Chairman of the Conference, who shall serve during his term of office as Chairman of the Committee; and

(ii) 10 members of the Conference who shall be appointed by the Chairman with the approval of the Council.

(B) In selecting members for the Committee under clause (ii) of paragraph (1)(A) of this subsection, the Chairman shall select 5 members who are employees of Federal regulatory agencies or executive departments and 5 members who are not employed by the Federal Government and who are broadly representative of regulated interests, including small business and consumer interests. A Vice Chairman shall be selected by the Committee from among its members.

(2) The Committee shall draft and submit to the Conference procedural rules for use in conducting proceedings subject to sections 553 through 558 of this title. The rules shall be designed to improve the fairness, quality, and efficiency of agency proceedings and to enhance opportunities for public participation in agency proceedings. The rules shall be consistent with sections 553 through 559 of this title and shall not abridge or modify any procedures established by statute. In drafting the rules required by this section, the Committee shall provide notice and an opportunity for oral or written participation by the public.

(3)(A) Any rules drafted pursuant to paragraph (1) which are adopted by a majority of the Conference shall not take effect unless they have been transmitted to the Congress by the Chairman on or after the beginning of a regular session of Congress and until a period of 90 days of continuous session of Congress has expired after the date of their transmission.

(B) For the purpose of subparagraph (A)—

(i) continuity of session is broken only by an adjournment of Congress sine die; and

(ii) the days on which either House is not in session because of an adjournment of more than three days to a day certain are excluded in the computation of any period of time in which Congress is in continuous session.

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CHAPTER 6—THE MANAGEMENT, PLANNING, AND ANALYSIS OF REGULATORY FUNCTIONS

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SUBCHAPTER I—DEFINITIONS; REGULATORY POLICY BOARD

§ 601. Definitions

For purposes of this chapter—

(1) the term "agency" has the same meaning as in section 551(1) of this title;

(2) the term "agency action" has the same meaning as in section 551(13) of this title;

(3) the term "rule" has the same meaning as in section 551(4) of this title, except that the term "rule" does not include—

(A) a rule issued relating to any matter described in clauses (A), (B), (C), (E), and (F) of section 553(a)(1) of this title; or

(B) a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances therefor or to valuations, costs or accounting, or practices relating to such rates, wages, structures, prices, appliances, services, or allowances;

(4) the term "major rule" means a rule that is estimated will—

(A) have an annual effect on the economy of $100,000,000 or more;

(B) cause a significant change in costs, prices for individual industries, geographic regions, or levels of government;

(C) have a significant impact on employment or the competitive process; or

(D) otherwise have a major impact,

except that such term does not include a rule promulgated to implement the internal revenue laws of the United States;

(5) the term "rule making" has the same meaning as in section 551(5) of this title;

(6) the term "Board" means the Regulatory Policy Board established in section 602 of this title; and

(7) the term "Chairman" means the Chairman of the Board.

§ 602. Establishment of Regulatory Policy Board

(a)(1) There is established the Regulatory Policy Board. The Board shall be composed of the Director of the Office of Management and Budget, the Chairman of the Administrative Conference of the United States, the Attorney General, a member of the Council of Economic Advisers, the heads of three agencies appointed by the President, at least one of whom shall be the head of an independent regulatory agency.

(2) Every other year, the President shall designate a Chairman and Vice Chairman of the Board. In designating the Chairman and Vice Chairman, the President shall rotate such positions among the members of the Board.

(b) There shall be an Executive Director of the Board, to be appointed by the President, by and with the advice and consent of the Senate. The Executive Director shall be compensated at the rate prescribed for level III of the Executive Schedule under section 5314 of title 5, United States Code. The Executive Director shall be responsible for the executive and administrative operation of the Board and shall perform such additional functions as the President may prescribe.

§ 603. Functions of the Board

The Board—

(1) shall prepare and publish during November and May of each year, a semiannual Calendar of Federal Regulations, which shall contain information concerning all major rules likely to be under consideration by any agency during the 12 months immediately following the date of publication of the Calendar, and which shall be prepared on the basis of the regulatory agendas prepared under section 611 of this title;

(2)(A) shall identify (i) overlapping and duplicative rules and (ii) single sectors of the economy significantly affected by the cumulative impact of rules promulgated by different agencies; and

(B) shall establish interagency task forces to make recommendations to the President and the Congress concerning such rules and sectors;

(3) shall—

(A) issue guidelines concerning agency compliance with sections 612, 621, 622, 623, 632, 633, 634, 635, and 641 of this title; and

(B) review agency compliance with such sections and report thereon to the President and the Congress;

(4)(A) shall select for review the initial regulatory analyses of not more than twenty of the most significant major rules proposed

in each year, except that in exceptional circumstances, the Board may select more than twenty such analyses for review;

(B) shall organize interagency reviews of such analyses; and

(C) shall submit public comments on such regulatory analyses during the rule making proceedings for such rules;

(5) shall consult with State and local governments to devise model procedures and techniques for identifying overlapping and duplicative reporting requirements imposed by Federal, State, and local governments, and develop possible methods to reduce such overlapping and duplicative requirements;

(6) shall conduct the evaluation and examination of regulatory agencies required by title III of the Regulatory Flexibility and Administrative Reform Act of 1980;

(7)(A) may, within 30 days after publication in the Federal Register of general notice of proposed rule making for a rule under section 553(b) of this title, determine whether the rule is a major rule under subparagraph (A) or (B) of section 601(4) of this title; and

(B) shall provide the agency with written notice of any determination under subparagraph (A) of this paragraph, including a statement of the reasons for such determination;

(8) shall assist in the coordination of reviews of related rules, policies, and practices by different agencies under section 641 of this title;

(9) shall monitor and review agency determinations pursuant to section 634(b) of this title that a rule will not have a significant economic effect on a substantial number of individuals, small businesses, small organizations, or small governmental jurisdictions; and

(10) shall—

(A) prepare a report concerning the regulatory activities of all agencies subject to the provisions of this chapter for each of the first five fiscal years beginning after the effective date of this chapter;

(B) transmit each such report to the President and the Congress between October 1 and October 31 of the fiscal year after the fiscal year for which the report is made; and

(C) make each such report available to the public.

§604. Regulatory Management Information System

(a) The Executive Director of the Board shall, in consultation with the Director of the Office of Management and Budget and the Director of the Federal Register, design, establish, and operate a Regulatory Management Information System (hereinafter in this section referred to as the "System"). In designing, establishing, and operating the System, the Executive Director shall—

(1) design and operate an index for the System which includes classifications for (A) the subject areas of agency rules, and (B) the persons or classes of persons subject to such rules;

(2) to the maximum extent possible, identify rules which apply to a particular industry or industries within a specified standard industrial classification (as defined by the Office of Federal Statistical Policy and Standards of the Department of Commerce); and

(3) make the data contained in the System available to agency officials who are planning new regulatory requirements or are reviewing regulatory requirements.

(b) The head of each agency shall classify all rules of that agency according to the index developed by the Executive Director under subsection (a)(1) of this section, and transmit such classifications to the Executive Director for inclusion in the System.

(c) The Executive Director of the Board shall make available to small businesses and other interested persons a list of rules indexed in the System that apply to particular subject areas, persons, or classes of persons.

(d) Whenever an agency is required by section 553(b) of this title, or by any other law, to publish general notice of proposed rule making for a rule, the agency shall compare the proposed requirements of the rule with the requirements of other proposed and promulgated rules indexed in the System in order to evaluate possible overlap or duplication of regulatory requirements. The agency shall include the results of such comparison with the notice of proposed rule making for the rule.

§ 605. Administrative provisions

(a) The Executive Director is authorized—

(1) to appoint such personnel as may be necessary in accordance with the provisions of this title;

(2) to employ experts and consultants in accordance with the provisions of section 3109 of this title; and

(3) to utilize, with their consent, the services, equipment, personnel, and facilities of other Federal departments and agencies and of State and local agencies and instrumentalities, with or without reimbursement therefor, and to transfer to such departments and agencies funds made available to the Board pursuant to this subchapter as reimbursement for the utilization of such services, equipment, personnel, information, and facilities.

(b) Upon request of the Board, the head of each agency shall promptly make the services, equipment, personnel, and facilities available to the Board to the greatest extent practicable.

§ 606. Data collection and disclosure

(a) Unless prohibited by law, any agency which collects, generates, or otherwise prepares or maintains data or information pertaining to Federal regulatory activities shall, upon the request of the Board, make that data or information available to the Board.

(b) Disclosure by the Board of data and information shall be in accordance with section 552 of this title and all laws applicable to the agency from which the information was obtained and the rules of practice and procedure of such agency, including statutes and rules concerning data or information obtained under a pledge of confidentiality, except that the Board is prohibited from disclosing any data or information received from an agency which is described in section 552(b) of this title unless the agency from which the data or information was obtained provides the Board with specific written permission to disclose the information.

(c) Consistent with the provisions of section 7213 of the Internal Revenue Code of 1954, this subchapter shall not be construed as providing for or authorizing any agency to divulge or to make known to the Board

the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed solely in any income tax return, or to permit any income tax return filed pursuant to the provisions of the Internal Revenue Code of 1954 to be seen or examined by the Board.

§ 607. Authorization of appropriations

To carry out the functions of the Regulatory Policy Board, there are authorized to be appropriated $5,000,000 for each of the fiscal years 1981, 1982, and 1983.

SUBCHAPTER II—ESTABLISHING REGULATORY AGENDAS AND SCHEDULES FOR COMPLETING PROCEEDINGS

§ 611. Regulatory agenda

(*a*) *During the months of October and April of each year, each agency shall publish in the Federal Register a regulatory agenda which shall contain a list of rules that the agency expects to propose or promulgate, and a brief description of probable areas of regulatory inquiry during the succeeding 12 months.*

(*b*) *For each rule listed on a regulatory agenda, the agency shall briefly describe the rule and state the objectives and anticipated benefits of the rule, the legal basis for the issuance of the rule, and the proposed dates for agency action on the rule. If the agency estimates the rule will be a major rule under section 601*(*4*) *of this title, the agency shall provide, to the extent practicable, a brief description of the economic impact of the rule.*

(*c*)(*1*) *For each area of regulatory inquiry listed on a regulatory agenda, the agency—*

(*A*) *shall describe the area of regulatory inquiry, including a statement of the objectives of the agency and an estimate of the likelihood that a major rule will be developed;*

(*B*) *shall invite suggestions from the public about the area of inquiry; and*

(*C*) *may hold informal public meetings, create ad hoc advisory committees, or use such other techniques which the agency determines useful to obtain suggestions.*

(*2*) *An agency is not required to respond to suggestions received under paragraph* (*1*)(*C*) *of this subsection.*

(*d*) *Each regulatory agenda shall include a list of rules, policies, and practices scheduled to be reviewed in accordance with section 641 of this title during the succeeding 12 months.*

(*e*) *Each regulatory agenda shall identify the agency official responsible for handling inquiries about each agenda item.*

(*f*) *Nothing in this section precludes an agency from considering or acting on any matter not included in a regulatory agenda, or requires an agency to consider or act on any matter listed in a regulatory agenda. If an agency decides not to take action on a matter included in the most recently published regulatory agenda, the agency shall include in the next regulatory agenda published by the agency a brief explanation of its decision.*

§ 612. Establishment of deadlines

(*a*) *In the case of any proceeding which an agency expects will require more than 120 days to complete, the agency shall include in the notice of* *proposed agency action made pursuant to section 553(b) or 554(b) of this title an announcement of the date by which it intends to complete final agency action on the matter. If the proceeding will require more than one year to complete, the agency shall include in such notice dates for completion of each major portion of the proceeding.*

(b) If an agency fails to complete a proceeding or a major portion of a proceeding by the date specified pursuant to subsection (a), the agency shall publish in the Federal Register a new date for completion of the proceeding or a portion thereof and a statement explaining why the agency failed to meet the date specified pursuant to subsection (a).

SUBCHAPTER III—ANALYSIS OF REGULATORY PROPOSALS

§ 621. Determination of major rule

Prior to publishing general notice of proposed rule making for any rule, each agency shall determine whether the rule is a major rule under section 601(4) of this title. If an agency determines that a rule is not a major rule, the agency shall publish, at the time of publication of general notice of proposed rule making for the rule, a statement explaining the reasons for such determination.

§ 622. Initial regulatory analysis

(a) Whenever an agency is required by section 553(b) of this title, or by any other law, to publish general notice of proposed rule making for any major rule, the agency shall prepare an initial regulatory analysis, written in plain English, for the rule. The agency shall make copies of the initial regulatory analysis available to members of the public without charge and shall publish in the Federal Register at the time of publication of general notice of proposed rule making for the rule a statement describing how members of the public may obtain such copies.

(b) Each initial regulatory analysis shall contain—

(1) a description of the reason why action by the agency is required;

(2) a succinct statement of the need for and objectives of the rule and a discussion of the legal basis of the proposed rule;

(3) a description of the projected reporting, recordkeeping, and other compliance requirements of the rule;

(4) an identification, to the extent practicable, of all relevant rules which the proposed rule may duplicate, overlap, or affect and a request for comments from members of the public concerning any rule, including comments concerning any rule promulagted by a State agency which the proposed rule might duplicate, overlap, or affect;

(5) a description of the significant alternatives to the proposed rule that may accomplish the stated objectives of the rule in a manner consistent with applicable statutes, including, if applicable, less anticompetitive alternatives, alternatives which will accommodate differences between geographic regions, and alternatives which use performance rather than design standards; and

(6) for the proposed rule, and for each alternative described pursuant to paragraph (5) of this subsection, a preliminary description of the protected economic effects, including costs and economic benefits, and of the projected health, safety, environmental and other

effects, and an appraisal of the predicted effectiveness of each alternative in meeting the stated objectives of the proposed rule.

(c) Following the publication of general notice of proposed rule making for a major rule, the agency shall allow a period of not less than 60 days prior to the promulgation of the final rule in order to provide opportunities for public comment on the initial regulatory analysis and for public participation in the rule making under section 626 of this title.

§ 623. Final regulatory analysis

(a) Whenever an agency—

(1) prepared an initial regulatory analysis of a rule under section 622 of this title; or

(2) determines, on the basis of comments received concerning a proposed rule, or on the basis of changes made in the rule by the agency, that such rule is a major rule under section 601(4) of this title for which an initial regulatory analysis should have been prepared under section 622 of this title;

the agency shall prepare and make available to the public, upon adoption of the rule, a final regulatory analysis. The agency shall make copies of the final regulatory analysis available to members of the public without charge and shall publish in the Federal Register with the publication of the final rule under section 553(d) of this title a statement describing how members of the public may obtain such copies.

(b) Each final regulatory analysis shall contain—

(1) a succinct statement of the need for, and the objectives of, the rule;

(2) a description of each of the alternatives to the rule which were considered by the agency, and a statement of the reasons why each one of the alternatives was rejected;

(3) a detailed analysis of the projected economic effects, including costs and economic benefits, and of the projected health, safety, environmental, and other effects which may result from the rule;

(4) a summary of the comments made by the public in response to the initial regulatory analysis, a summary of the assessment made by the agency of such comments, and a statement of any changes made in the proposed rule as a result of such comments; and

(5) a description of any reporting or recordkeeping requirements which will result from the final rule.

§ 624. Effect on other law

The requirements of sections 622 and 623 of this title do not alter in any manner the substantive standards applicable to agency action or the procedural standards otherwise applicable to agency action.

§ 625. Preparation of regulatory analyses

(a)(1) In carrying out the provisions of sections 622(b)(6) and 623(b)(3) of this title, an agency is not limited to providing a quantifiable or numerical analysis of the effects of a rule or alternatives to a rule and may use more general descriptions where quantification is impractical or less accurate.

(2) In any case in which an agency relied on information from external sources in the preparation of any regulatory analysis for a proceeding required to be decided on the basis of a record, the agency shall include such information or a reference to such information in the record of the proceeding.

(b) An agency may not arrange for the preparation of an initial or final regulatory analysis by contract other than a contract for the provision of the temporary or intermittent services of experts or consultants under section 3109 of this title. This subsection does not apply to the compilation of information to be used in the preparation of any such analysis.

§ 626. Additional procedures in major rule making

(a)(1) As a part of any opportunity an agency affords the public to participate in the consideration of a particular major rule, the agency shall, in addition to any procedure that may be required by law, use such oral or written procedures as the agency determines are appropriate for resolution of significant controversies over a material fact in dispute. In determining appropriate procedures, an agency shall consider the expected impact of the proposed major rule, the nature of the facts in dispute, the number and types of persons interested in commenting on the dispute, the length of time available for consideration of the proposed major rule, and such other matters as the agency determines appropriate. Such procedures may include—

(A) advanced notice of proposed rule making;

(B) informal public hearings, meetings, or conferences;

(C) the creation of expert advisory councils, which shall be subject to the provisions of the Federal Advisory Committee Act, including the guidelines set out in section 5(b) of such Act;

(D) mediation techniques;

(E) the presentation of staff arguments for written comment and rebuttal;

(F) the presentation of witnesses for direct or cross examination; or

(G) the opportunity for oral argument.

(2) There shall be no judicial review prior to the promulgation of a final major rule with respect to the issue of whether the procedures used by the agency under paragraph (1) in promulgating such rule are appropriate. Upon review of a final major rule, the court may invalidate the rule on the basis that the agency made errors in determining appropriate procedures under paragraph (1) only if such errors were so serious and of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if the errors had not been made.

(b) In addition to the matters required by section 553(b) of this title, the general notice of proposed rule making for a major rule shall include—

(1) a summary of the factual data and other information on which the proposed major rule is based;

(2) a description of any methodology used in obtaining and evaluating the data or information; and

(3) an identification of the reports, documents, studies, or other information from which such data or information was derived.

(c) If, during a rule making proceeding for a major rule, an agency proposes to rely on additional data or information not specified in the summary included in the general notice of proposed rule making pursuant to paragraph (1) of subsection (b), the agency shall—

(1) include such additional data or information in the file required by section 553(e) of this title;

(2) include in such file the matters described in paragraphs (2) and (3) of subsection (b) with respect to such data and information; and

(3) permit sufficient time for response or comment by interested persons to the matters included in the file pursuant to paragraphs (1) and (2) of this subsection.

§ 627. Elimination of duplicative analyses

In order to avoid duplicative action or the waste of resources, an agency may—

(1) consider a series of closely related rules as one rule for the purposes of sections 622 and 623 of this title; and

(2) whenever appropriate, incorporate any data or analysis contained in a regulatory analysis in any other impact statement or analysis required by law.

§ 628. Procedure for waiver or delay of completion

(a) An agency head may waive or delay the completion of some or all of the requirements of section 622 of this title by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes compliance or timely compliance with the provisions of section 622 of this title impracticable.

(b) An agency head may not waive the requirements of section 623 of this title. An agency head may delay the completion of the requirements of section 623 of this title for a period of not more than 60 days after the date of publication in the Federal Register of a final rule by publishing in the Federal Register, not later than such date of publication, a written finding, with reasons therefor, that the final rule is being promulgated in response to an emergency that makes timely compliance with the provisions of section 623 of this title impracticable.

§ 629. Judicial review

(a) Except as otherwise provided in this chapter, any determination by an agency or the Board concerning the applicability of any of the provisions of this chapter to any action of the agency, including any determination that a rule is not a major rule, shall not be subject to judicial review.

(b) Any regulatory analysis prepared under sections 622 and 623 of this title and any regulatory flexibility analysis prepared under sections 632 and 633 of this title, and the compliance or noncompliance of the agency with the provisions of this subchapter and subchapter IV in preparing and adopting any such analysis, shall not be subject to judicial review: Provided, That the contents of a regulatory analysis or a regulatory flexibility analysis shall, to the extent relevant, be considered by a court when determining the validity of the rule which is the subject of the analysis. When an action for judicial review of a rule is instituted, any regulatory analysis or regulatory flexibility analysis for such rule shall constitute part of the whole rule making record of agency action in connection with such review.

(c) Nothing in this section bars judicial review of any other impact statement or similar analysis required by any other law if judicial review of such statement or analysis is otherwise provided by law.

SUBCHAPTER IV—REGULATION FLEXIBILITY

§ 631. *Definitions*

For purposes of this subchapter—

(1) the term "individual" does not include any individual who is affected by a rule primarily in his capacity as an officer or employee of a business, organization, or governmental jurisdiction;

(2) the term "small business" has the same meaning as the term "small business concern" under section 3 of the Small Business Act, unless an agency, after consultation with the Office of Advocacy of the Small Business Administration, establishes by rule in accordance with section 553 of this title, a definition of such term which is appropriate to the activities of the agency or any rule of the agency, and publishes such definition in the Federal Register;

(3) the term "small organization" means any not-for-profit enterprise which is independently owned and operated and is not dominant in its field, unless an agency establishes by rule in accordance with section 553 of this title, a definition of such term which is appropriate to the activities of the agency or any rule of the agency, and publishes such definition in the Federal Register; and

(4) the term "small governmental jurisdiction" means governments of cities, counties, towns, villages, school districts, or special assessment districts, with a population of less than 100,000, unless an agency establishes by rule in accordance with section 553 of this title a definition of such term which is appropriate to the activities of the agency or any rule of the agency and which is based on such factors as location in rural or sparsely populated areas or limited revenues due to the population of such jurisdiction, and publishes such rule in the Federal Register.

§ 632. *Initial regulatory flexibility analysis*

(a) Whenever an agency is required by section 553 of this title, or any other law, to publish general notice of proposed rule making for any proposed rule, the agency shall prepare and make available for public comment an initial regulatory flexibility analysis. Such analysis shall describe whether the proposed rule will have a significant economic impact on individuals, small businesses, small organizations, and small governmental jurisdictions. The initial regulatory flexibility analysis, or a summary of the analysis, shall be published in the Federal Register at the time of the publication of general notice of proposed rule making for the rule. The agency shall transmit a copy of the initial regulatory flexibility analysis to the Chief Counsel for Advocacy of the Small Business Administration.

(b) Each initial regulatory flexibility analysis required under this section shall contain a description of significant alternatives to the proposed rule which accomplish the stated objectives of the proposed rule in a manner consistent with the stated objectives of applicable statutes and which minimize the burdensome effect of the proposed rule on individuals, small businesses, small organizations, and small governmental jurisdic-

tions. Consistent with the stated objectives of applicable statutes, the analysis shall discuss alternatives such as—

(1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to individuals, small businesses, small organizations, and small governmental jurisdictions;

(2) an exemption from coverage of the rule, or any part thereof, for such individuals, businesses, organizations, and governmental jurisdictions;

(3) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such individuals, businesses, organizations, and governmental jurisdictions; and

(4) the use of performance rather than design standards or any other reasonable means to reduce, in a manner consistent with the stated objectives of applicable statutes, the burdensome effect of the rule on such individuals, businesses, organizations, and governmental jurisdictions.

§ 633. Final regulatory flexibility analysis

(a) When an agency promulgates a final rule under section 553(d) of this title, the agency shall prepare a final regulatory flexibility analysis. Each final regulatory flexibility analysis shall contain—

(1) a succinct statement of the need for, and the objectives of, the rule;

(2) a summary of the issues raised by the public comments in response to the initial regulatory flexibility analysis, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments; and

(3) a description of each of the alternatives to the rule which were considered by the agency and which would minimize the burdensome effect of the rule on individuals, small businesses, small organizations, and small governmental jurisdictions, and a statement of the reasons why each one of the alternatives was rejected by the agency.

(b) The agency shall make copies of the final regulatory flexibility analysis available to members of the public without charge, and shall publish in the Federal Register at the time of publication of the final rule under section 553(d) of this title a statement describing how the public may obtain such copies.

§ 634. Avoidance of duplicative or unnecessary analyses

(a) Any Federal agency may perform the analyses required by sections 632 and 633 of this title in conjunction with or as a part of any other regulatory analysis required by this title or any other law if such other analysis satisfies the provisions of such sections.

(b) Sections 632 and 633 of this title shall not apply to any proposed or final rule if the agency determines that the rule will not, if promulgated, have a significant economic effect on a substantial number of individuals, small businesses, small organizations, or small governmental jurisdictions. If the agency makes a determination under the preceding sentence, the agency shall notify the Board of such determination and publish, at the time of publication in the Federal Register of general notice of proposed rule making for the rule or at the time of publication of the final rule, a statement explaining the reasons for such determination.

§ 635. Procedures for agency consideration of rules

When any rule is promulgated which will have a significant economic impact on individuals, small businesses, small organizations, and small governmental jurisdictions, the head of the agency promulgating the rule or the official of the agency with statutory responsibility for the promulgation of the rule shall assure that individuals, small businesses, small organizations, and small governmental jurisdictions have been given an opportunity to participate in the rule making for the rule through techniques such as—

(1) the inclusion in a regulatory agenda published under section 611 of this title of a notice that the proposed rule may have a significant economic effect on a substantial number of individuals, small businesses, small organizations, and small governmental jurisdictions;

(2) the publication of general notice of proposed rule making in publications likely to be obtained by individuals, small businesses, small organizations, and small governmental jurisdictions affected by the rule;

(3) the direct notification of interested individuals, small businesses, small organizations, and small governmental jurisdictions;

(4) the conduct of open conferences or public hearings concerning the rule for individuals, small businesses, small organizations, and small governmental jurisdictions; and

(5) the adoption or modification of procedural rules to reduce the cost or complexity of participation in the rule making by individuals, small businesses, small organizations, and small governmental jurisdictions.

§ 636. Effect on other law

The requirements of this subchapter do not alter in any manner the substantive standards applicable to agency action or the procedural standards otherwise applicable to agency action.

§ 637. Report

The Chief Counsel for Advocacy of the Small Business Administration shall monitor and evaluate agency compliance with this subchapter and shall report at least annually thereon to the Board and to the Committees on the Judiciary of the Senate and the House of Representatives, the Select Committee on Small Business of the Senate, and the Committee on Small Business of the House of Representatives.

SUBCHAPTER V—AGENCY REVIEW OF RULES, POLICIES, AND PRACTICES

§ 641. Periodic review of regulatory requirements

(a) Within 4 months after the effective date of this chapter, each agency shall prepare a list of all major rules promulgated by the agency prior to the date of preparation of the list.

(b)(1) Within 8 months after the effective date of this chapter, each agency shall prepare and publish in the Federal Register a draft schedule for the review of rules, policies, and practices of the agency during the 5-year period beginning on the date on which the final schedule for the review of rules, policies, and practices is published under subsection (c) of this section. In each of the 5 years in which the review is to be conducted, the agency shall review (A) 10 percent of the major rules contained in the list

prepared pursuant to subsection (a) of this section, but no more than 10 such rules, and (B) such additional rules, policies, and practices of the agency as the agency may select.

(2) Each draft schedule shall contain a brief explanation of the reasons for selecting each rule, policy, or practice on the schedule and shall set a date for the completion of the review of each such rule, policy, or practice.

(c) Not later than 1 year after the effective date of this chapter, each agency shall publish in the Federal Register a final schedule for the review of rules, policies, and practices.

(d) On the date of publication of a final major rule in the Federal Register, each agency shall announce a date for the review of the rule in accordance with subsection (e) of this section. The agency shall set the date for review of the rule at not more than 10 years from the date on which the final major rule is published in the Federal Register.

(e)(1) At least 30 days before the date on which an agency is scheduled to review a major rule, the agency shall publish notice of such review in the Federal Register and shall request public comments concerning the rule to be reviewed.

(2) When an agency reviews a rule, policy, or practice scheduled for review under subsection (c) or (d) of this section, the agency shall prepare an assessment of the rule, policy, or practice, including an analysis of—

(A) the economic, health, safety, environmental, and other benefits being provided by the rule, policy, or practice;

(B) the adverse economic effects, including costs, the effects on competition, and other effects of the rule, policy, or practice;

(C) the cost and nature of any problems encountered by the agency in obtaining compliance with the rule, policy, or practice; and

(D) the extent to which the rule, policy, or practice overlaps with or duplicates other Federal rules, policies, or practices, including rules, policies, or practices of other agencies.

(3) The assessment required by paragraph (2) of this subsection shall include a summary of issues raised by the public comments received pursuant to paragraph (1) of this subsection, a summary of the agency responses to such issues and the recommendations of the agency, based on the matters analyzed pursuant to clauses (A) through (D) of such paragraph, as to whether—

(A) agency activities to obtain compliance should be revised or strengthened to better achieve the objectives of the rule, policy, or practice; or

(B) the rule, policy, or practice should be rescinded, amended to enhance the achievement of its objectives or to reduce any adverse effects of achieving its objectives, or continued without change.

(4) Each agency shall make copies of each assessment made under paragraph (1) of this subsection available to members of the public without charge, and shall publish in the Federal Register a statement describing how members of the public may obtain such copies.

(f) The agency may amend any schedule for review of rules, policies, and practices with the concurrence of the Executive Director of the Board by publishing such amendment in the Federal Register.

(g) Four years after the effective date of this chapter, the President shall prepare and transmit to the Congress a report which evaluates the effectiveness of the procedure established by this section for the review of agency rules, policies, and practices and makes recommendations for legislative

action concerning the establishment of an additional 5-year period for the review of agency rules, policies, and practices.

SUBCHAPTER VI—AGENCY COORDINATION OF RULE MAKING

§ *651. Applicability*

(a) Except as provided in subsection (b), this subchapter applies to—

(1) any rule for which the agency must publish general notice of proposed rule making pursuant to section 553(b) of this title; and

(2) any rule for which the agency makes a finding under clause (D)(ii) of section 553(a)(1) of this title.

(b) In the case of a rule described in subsection (a)(2), the agency shall comply with the provisions of this subchapter as soon as practicable after the promulgation of the rule.

§ *652. Notification and comment*

(a) As soon as practicable, but not later than the date on which an agency publishes in the Federal Register general notice of proposed rule making for a rule, each agency listed in paragraphs (1) through (15) of subsection (b) shall notify each agency listed in the respective subparagraphs of each such paragraph of a proposed rule and shall provide, if requested, any analysis of the rule required by law. Each agency notified of a proposed rule pursuant to the preceding sentence may make any written comments it finds appropriate concerning the proposed rule within a reasonable time after publication in the Federal Register of the general notice of proposed rule making for the rule.

(b) Pursuant to subsection (a)—

- *(1) the Department of Agriculture shall notify—*
  - *(A) the Council of Economic Advisers; and*
  - *(B) the Antitrust Division of the Department of Justice;*
- *(2) the Department of Commerce shall notify—*
  - *(A) the Council of Economic Advisers; and*
  - *(B) the Antitrust Division of the Department of Justice;*
- *(3) the Department of Energy shall notify—*
  - *(A) the Council of Economic Advisers;*
  - *(B) the Antitrust Division of the Department of Justice;*
  - *(C) the Nuclear Regulatory Commission; and*
  - *(D) the Environmental Protection Agency;*
- *(4) the Federal Energy Regulatory Commission shall notify—*
  - *(A) the Council of Economic Advisers; and*
  - *(B) the Antitrust Division of the Department of Justice;*
- *(5) the Department of the Interior shall notify—*
  - *(A) the Council of Economic Advisers;*
  - *(B) the Department of Energy; and*
  - *(C) the Environmental Protection Agency;*
- *(6) the Civil Aeronautics Board shall notify—*
  - *(A) the Council of Economic Advisers;*
  - *(B) the Antitrust Division of the Department of Justice; and*
  - *(C) the Federal Aviation Administration of the Department of Transportation;*
- *(7) the Federal Communications Commission shall notify—*
  - *(A) the Council of Economic Advisers; and*
  - *(B) the Antitrust Division of the Department of Justice;*

(8) the Interstate Commerce Commission shall notify—

(A) the Council of Economic Advisers;

(B) the Antitrust Division of the Department of Justice; and

(C) the National Highway Traffic Safety Administration of the Department of Transportation;

(9) the Federal Maritime Commission shall notify—

(A) the Council of Economic Advisers; and

(B) the Antitrust Division of the Department of Justice;

(10) the Federal Trade Commission shall notify—

(A) the Council of Economic Advisers; and

(B) the Antitrust Division of the Department of Justice;

(11) the Mine Safety and Health Administration of the Department of Labor shall notify—

(A) the Council of Economic Advisers;

(B) the Environmental Protection Agency;

(C) the Bureau of Mines of the Department of the Interior; and

(D) the Department of Energy;

(12) the Environmental Protection Agency shall notify—

(A) the Council of Economic Advisers;

(B) the Antitrust Division of the Department of Justice;

(C) the Department of Energy;

(D) the Nuclear Regulatory Commission;

(E) the Occupational Safety and Health Administration of the Department of Labor; and

(F) the Mine Safety and Health Administration of the Department of the Interior;

(13) the International Trade Commission shall notify—

(A) the Council of Economic Advisers;

(B) the Antitrust Division of the Department of Justice; and

(C) the Treasury Department;

(14) the National Highway Traffic Safety Administration of the Department of Transportation shall notify—

(A) the Council of Economic Advisers;

(B) the Antitrust Division of the Department of Justice; and

(C) the Interstate Commerce Commission; and

(15) the Occupational Safety and Health Administration of the Department of Labor shall notify—

(A) the Council of Economic Advisers;

(B) the Antitrust Division of the Department of Justice;

(C) the Department of Energy;

(D) the Environmental Protection Agency;

(E) the Nuclear Regulatory Commission; and

(F) the Mine Safety and Health Administration of the Department of Labor.

(c) The Board may designate additional agencies to comment on proposed rules, and may request an agency to comment on the policies of another agency.

(d) At the time an agency submits comments concerning a rule of another agency pursuant to subsection (a), the agency submitting such comments shall forward a copy of such comments to the Director of the Office of Management and Budget.

(e) An action of an agency under this section shall not be subject to judicial review, except that any written comments of an agency concerning a proposed rule of another agency included in the file established pursuant to section 553(e) of this title shall constitute part of the whole rule making record of agency action in connection with the review of such rule.

CHAPTER 7—JUDICIAL REVIEW

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§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court [shall] *shall, without according any presumption of validity to an agency rule,* decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. *The preceding sentence does not, in any civil or criminal action in which an agency rule is set up as a defense, affect any applicable rule of law which accords a presumption of validity to such an agency rule or which provides that reliance on such an agency rule shall be a defense.* The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in [a] *the* case [subject to sections 556 and 557 of this title] *of factual determinations (including inferences or projections) in proceedings subject to section 553 of this title or to section 554 of this title* or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. *In making determinations under clause (2)(C) of this section, the reviewing court shall require that the agency's statutory jurisdiction or authority has been granted expressly or, in light of the statute and other relevant materials, by clear implication. The standards of review set forth in this section shall also apply whenever an agency rule is challenged in any civil or criminal action not included within the scope of section 703 of this title.*

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CHAPTER 8—APPOINTMENT AND REASSIGNMENT OF ADMINISTRATIVE LAW JUDGES

Sec.
801. Definitions.
802. Appointment.
803. Classification and pay.
804. Reassignment.

§ 801. Definitions

For purposes of this chapter, the term—

(1) "agency" means an agency as defined in section 551(1) of this title;

(2) "administrative law judge" means an individual appointed under section 802 of this title; and

(3) "Chairman" means the Chairman of the Administrative Conference of the United States.

§ 802. Appointment

(a) Subject to the provisions of this section, each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with section 554 of this title. Administrative law judges shall be assigned to cases in rotation insofar as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

(b)(1) The Chairman shall provide for the wide dissemination of information about administrative law judge positions and shall recruit for administrative law judge positions from all groups of qualified persons.

(2) In consultation with the Office of Personnel Management, the Chairman shall establish qualification requirements for administrative law judges and shall adopt and administer a system for examining and selecting administrative law judges. The system adopted shall provide for—

(A) ranking eligible candidates for administrative law judge in accordance with their relative qualifications; and

(B) consistency with section 2302 of this title.

Eligible candidates shall be ranked and certified in numerical order or by category.

(3) If an appointing agency requests from the Chairman a certificate of eligibles for the position of administrative law judge, the Chairman shall certify from the register of eligibles for the position of administrative law judge the names of the 10 eligibles with the highest ratings.

(4) For appointment to each vacancy as an administrative law judge, the appointing agency shall select from the highest 10 eligibles available for appointment on the certificate furnished under paragraph (3) of this subsection.

§ 803. Classification and pay

(a) The Chairman shall establish and from time to time revise the maximum number of administrative law judges that may at any one time be placed in GS–16, GS–17, or GS–18 of the General Schedule. The total number of such positions may not exceed 350. These positions shall not count against any other Government-wide or agency limit on positions specified in section 5108 of this title.

(b) Administrative law judges appointed under section 802 of this title are entitled to pay prescribed by the Chairman independently of any agency recommendations or ratings and in accordance with subchapter III of chapter 53 and with chapter 51 of this title.

§ 804. Reassignment

The Chairman of the Administrative Conference of the United States shall select administrative law judges appointed under section 802 of this title to be detailed from any agency to any other agency that occasionally or temporarily is insufficiently staffed with administrative law judges, and *such administrative law judges shall be detailed if the agency from which they are to be transferred and each administrative law judge to be transferred consents to the transfer.*

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PART II—CIVIL SERVICE FUNCTIONS AND RESPONSIBILITIES

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CHAPTER 13—SPECIAL AUTHORITY

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§ 1305. Administrative law judges

[For the purpose of sections 3105, 3344, 4301(2)(D), and 5372 of this title and the provisions of section 5335(a)(B) of this title that relate to administrative law judges, the Office of Personnel Management may, and for] *For* the purpose of section 7521 of this title, the Merit Systems Protection Board may investigate, require reports by agencies, issue reports, including an annual report to Congress, prescribe regulations, appoint advisory committees as necessary, recommend legislation, subpena witnesses and records, and pay witness fees as established for the courts of the United States.

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PART III—EMPLOYEES

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Subpart A—General Provisions

CHAPTER 21—DEFINITIONS

Sec.
2101. Civil service; armed forces; uniformed services.
2101a. The Senior Executive Service.
2101b. Administrative law judge career service.
2102. The competitive service.
2103. The excepted service.
2104. Officer.
2105. Employee.
2106. Member of Congress.
2107. Congressional employee.
2108. Veteran: disabled veteran; preference eligible.
2109. Air traffic controller.

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§ 2101b. Administrative law judge career service

The administrative law judge career service consists of administrative law judges appointed under section 802 of this title.

§ 2102. The competitive service

(a) The "competitive service" consists of—

(1) all civil service positions in the executive branch, except—

(A) positions which are specifically exempted from the competitive service by or under statute;

(B) positions to which appointments are made by nomination for confirmation by the Senate, unless the Senate otherwise directs; **[**and**]**

(C) positions in the Senior Executive Service; *and*

(D) administrative law judge positions;

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§ 2103. The excepted service

(a) For the purpose of this title, the "excepted service" consists of those civil service positions which are not in the competitive **[**service or the Senior Executive Service.**]** *service, the Senior Executive Service, or the Administrative Law Judge Career Service.*

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§ 2108. Veteran; disabled veteran; preference eligible

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(3) "preference eligible" means, except as provided in paragraph (4) of this section—

(A) a veteran as defined by paragraph (1)(A) of this section;

(B) a veteran as defined by paragraph (1)(B) of this section;

(C) a disabled veteran;

(D) the unmarried widow or widower of a veteran as defined by paragraph (1)(A) of this section;

(E) the wife or husband of a service-connected disabled veteran if the veteran has been unable to qualify for any appointment in the civil service or in the government of the District of Columbia;

(F) the mother of an individual who lost his life under honorable conditions while serving in the armed forces during a period named by paragraph (1)(A) of this section, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed; and

(G) the mother of a service-connected permanently and totally disabled veteran, if—

(i) her husband is totally and permanently disabled;

(ii) she is widowed, divorced, or separated from the father and has not remarried; or

(iii) she has remarried but is widowed, divorced, or legally separated from her husband when preference is claimed;

but does not include applicants for, or members of, the Senior Executive **[**Service.**]** *Service, applicants for the position of administrative law judge or administrative law judges.*

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SUBPART F—LABOR-MANAGEMENT AND EMPLOYEE RELATIONS

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CHAPTER 75—ADVERSE ACTIONS

Subpart B—Employment and Retention

CHAPTER 31—AUTHORITY FOR EMPLOYMENT

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SUBCHAPTER I—EMPLOYMENT AUTHORITIES

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§ 3105. Appointment of administrative law judges

[Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.]

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CHAPTER 33—EXAMINATION, SELECTION, AND PLACEMENT

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SUBCHAPTER I—EXAMINATION, CERTIFICATION, AND APPOINTMENT

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§ 3320. Excepted service; government of the District of Columbia; selection

The nominating or appointing authority shall select for appointment to each vacancy in the excepted service in the executive branch and in the government of the District of Columbia from the qualified applicants in the same manner and under the same conditions required for the competitive service by sections 3308–3318 of this title. This section does not apply to an appointment required by Congress to be confirmed by, or made with the advice and consent of, the Senate. *This section does not apply to administrative law judges appointed pursuant to section 802 of this title.*

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§ 3324. Appointments at GS-16, 17, and 18

(a) An appointment to a position in GS–16, 17, or 18 may be made only on approval of the qualifications of the proposed appointee by the Office of Personnel Management. This section does not apply to a position—

(1) provided for in section *802 or* 5108(c)(2) of this title;

SUBCHAPTER III—DETAILS

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§ 3344. Details; administrative law judges

[An agency as defined by section 551 of this title which occasionally or temporarily is insufficiently staffed with administrative law judges appointed under section 3105 of this title may use administrative law judges selected by the Office of Personnel Management from and with the consent of other agencies.]

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SUBPART C—EMPLOYEE PERFORMANCE

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CHAPTER 43—PERFORMANCE APPRAISAL

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SUBCHAPTER I—GENERAL PROVISIONS

§ 4301. Definitions

For the purpose of this subchapter—

(1) "agency" means—

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(2) "employee" means an individual employed in or under an agency, but does not include—

(A) an employee outside the United States who is paid in accordance with local native prevailing wage rates for the area in which employed;

(B) an individual in the Foreign Service of the United States;

(C) a physician, dentist, nurse, or other employee in the Department of Medicine and Surgery, Veterans' Administration whose pay is fixed under chapter 73 of title 38;

(D) an administrative law judge appointed under section [3105] *802* of this title;

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Subpart D—Pay and Allowances

CHAPTER 53—PAY RATES AND SYSTEMS

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SUBCHAPTER III—GENERAL SCHEDULE PAY RATES

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§ 5335. Periodic step—increases

(a) An employee paid on an annual basis, and occupying a permanent position within the scope of the General Schedule, who has not reached the maximum rate of pay for the grade in which his position is placed, shall be advanced in pay successively to the next higher rate within the grade at the beginning of the next pay period following the completion of—

(1) each 52 calendar weeks of service in pay rates 1, 2, and 3;

(2) each 104 calendar weeks of service in pay rates 4, 5, and 6; or

(3) each 156 calendar weeks of service in pay rates 7, 8, and 9; subject to the following conditions:

(A) the employee did not receive an equivalent increase in pay from any cause during that period; and

(B) the work of the employee, except an administrative law judge appointed under section [3105] *802* of this title, is of an acceptable level of competence as determined by the head of the agency.

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SUBCHAPTER VII—MISCELLANEOUS PROVISIONS

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§ 5372. Administrative law judges

[Administrative law judges appointed under section 3105 of this title are entitled to pay prescribed by the Office of Personnel Management independently of agency recommendations or ratings and in accordance with subchapter III of this chapter and chapter 51 of this title.]

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§ 7521. Actions against administrative law judges

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(a) An action may be taken against an administrative law judge appointed under section [3105] *802* of this title by the agency in which the administrative law judge is employed only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board.

TITLE 28—UNITED STATES CODE

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CHAPTER 87—DISTRICT COURTS; VENUE

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§ 1391. Venue generally

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(g) (1) In any action brought in the United States District Court for the District of Columbia under subsection (e) that may be an action of a local environmental nature as defined in section 1404(e)(2) of this title, the plaintiff shall, at the time the action is filed—

(A) forward a copy of the complaint to the attorney general of each State in which a judicial district described in section 1404(e)(2) of this title is located, subject to the limitation provided in paragraph (2); and

(B) file a statement with the clerk of the court indicating compliance with the requirements of subparagraph (A).

(2) The provisions of paragraph (1) (A) do not require the plaintiff to forward a copy of the complaint to more than five State attorneys general.

(3) Compliance with this subsection does not constitute an admission by the plaintiff that the action is an action of a local environmental nature as defined in section 1404(e)(2) of this title. Failure to comply with this subsection may be cause, in the discretion of the court, for appropriate sanctions, including dismissal of the action without prejudice.

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§ 1404. Change of venue

(a) For the convenience of parties and [witnesses,] *witnesses* and in the interest of justice, *including considerations of the primarily local or regional impact of an action*, a district court may transfer any civil action to any other district or division where it might have been brought.

* * * * * * *

(e)(1) In any civil action brought under section 1391(e) of this title in which the court, upon motion of a party or an intervenor or upon its own motion, determines that the action is an action of a local environmental nature as defined in paragraph (2), the court shall transfer the action to a judicial district described in paragraph (2) where the action might have been brought unless a party shows (A) that substantial hardship or injustice would result from such a transfer or (B) that the impact of the action is substantially national rather than local in effect or scope. Where the action could be transferred to more than one such district court, the court shall determine the most appropriate forum pursuant to the provisions of section 1404(a).

(2) An action is an action of a local environmental nature if—

(A)(i) the action primarily affects local or regional interests in one or more judicial districts other than the district in which the action was originally filed; or

(ii) a substantial part of the acts or omissions giving rise to the action occurred, or a substantial part of the property that is the subject of the action is located, in one or more judicial districts other than the district in which the action was originally filed; and

(B) the action arises under any Act of Congress pertaining to wildlife, public lands, water rights, or any other Act of Congress relating to environmental quality.

(3) If an action of a local environmental nature has a significant impact in the district in which the action was originally filed, the provisions of paragraph (1) do not require the transfer of such action.

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CHAPTER 133—REVIEW—MISCELLANEOUS PROVISIONS

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§ 2112. Record on review and enforcement of agency orders

(a) The several courts of appeals shall have power to adopt, with the approval of the judicial conference of the United States, rules, which so far as practicable shall be uniform in all such courts prescribing the time and manner of filing and the contents of the record in all proceedings instituted in the courts of appeals to enjoin, set aside, suspend, modify, or otherwise review or enforce orders of administrative agencies, boards, commissions, and officers, to the extent that the applicable statute does not specifically prescribe such time or manner of filing or contents of the record. Such rules may authorize the agency, board, commission, or officer to file in the court a certified list of the materials comprising the record and retain and hold for the court all such materials and transmit the same or any part thereof to the court, when and as required by it, at any time prior to the final determination of the proceeding, and such filing of such certified list of the materials comprising the record and such subsequent transmittal of any such materials when and as required shall be deemed full compliance with any provision of law requiring the filing of the record in the court. The record in such proceedings shall be certified and filed in or held for and transmitted to the court of appeals by the agency, board, commission, or officer concerned within the time and in the manner prescribed by such rules. If proceedings have been instituted in two or more courts of appeals with respect to the same order the agency, board, commission, or officer concerned shall file the record in that one of such courts in which a proceeding with respect to such order was first instituted. The other courts in which such proceedings are pending shall thereupon transfer them to the court of appeals in which the record has been filed. For the convenience of the parties *and* in the interest of [justice] *justice, including considerations of the primarily local or regional impact of such proceedings*, such court may thereafter transfer all the proceedings with respect to such order to any other court of appeals.

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